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FILARTIGA'S FIRM FOOTING: INTERNATIONAL HUMAN RIGHTS AND FEDERAL COMMON LAW

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FEDERAL COMMON LAW*

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TABLE OF CONTENTS

INTRODUCTION ................................................................................. 464
I. FRAMING THE DEBATE: THE REVISIONIST CHALLENGE
   to the Modern Position ............................................................... 470
   A. The Modern Position ............................................................. 472
   B. The Revisionist Challenge .................................................... 476

II. FEDERAL COURT ENDORSEMENT OF THE MODERN
   POSITION: STRUCTURE OF THE MODERN LITIGATION ... 479
   A. Sabbatino and CIL's Status as Federal Common
      Law .................................................................................. 480
      1. Delimiting the Courts' Role: Sabbatino's "Sliding
         Scale" ........................................................................... 480
      2. Sabbatino's Embrace of the Modern Position ... 484
         a. Sabbatino's Logic Supports the Modern
            Position ........................................................................ 484
         b. Sabbatino's Reliance of Judge Jessup's
            Defense of the Modern Position ......................... 487
         c. Sabbatino and the Federal Common Law of
            Foreign Relations ..................................................... 490
   B. Standards for Actionable CIL .................................................. 494
   C. The Content of CIL under § 1350 Litigation .................. 497
      1. Easy Cases Part I: Incontrovertible Jus Cogens
         Violations ....................................................................... 498
         a. Official Torture ......................................................... 498
         b. Extrajudicial Killings ............................................... 501
         c. Prolonged Arbitrary Detention ......................... 502
         d. Genocide ................................................................. 502
         e. Disappearances ....................................................... 504
         f. Ancient Law of Nations Violations .................. 505

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THE United States has long maintained commitments to the international legal order, dating back to the Founding. In fact, the Framers held the Constitutional Convention in large part due to the perceived inability of the Confederation to uphold American obligations under international law.1 They recognized the international legal significance of U.S. independence: As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations.2 The Constitution reflected this disposition in both text and structure.3

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1. See Frederick W. Marks III, Independence on Trial: Foreign Affairs and the Making of the Constitution 142 (1973); see also Finzer v. Barry 798 F.2d 1450, 1455 (D.C. Cir. 1986). Judge Bork wrote:

   The need for such authority was, of course, one of the reasons a new constitution was desired, and the power was placed among the great powers granted the new government. Implementation of the law of nations by the American government was seen as crucial to the conduct of our foreign relations, a subject of pervasive concern in the Constitution.

   Id.

2. See Ware v. Hylton 3 U.S. (3 Dall.) 199, 281 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (“The United States had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest, as well as their duty, to provide, that those laws should be respected and obeyed . . . .”).

Under the Constitution, the Framers assigned the federal judiciary jurisdiction over most law of nations questions. Article III provided federal jurisdiction directly over the principal judicial subjects of international law—ambassadors, vice-consuls, and foreign citizens—and the admiralty and maritime clauses covered most of the remaining international legal matters.  

The implementing legislation of Article III, namely the Judiciary Act of 1789, detailed the scope of lower federal court jurisdiction in this arena. Under the Act, an important statutory component—one which serves as the focus of this Article’s analysis—was Section 9, commonly referred to as the Alien Torts Claims Act (ATCA). The ATCA, now codified at 28 U.S.C. § 1350, provides that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or treaty of the United States.”

Until recently, the ATCA was seldom invoked as a basis for federal jurisdiction. Not until the modern, post-Nuremberg conception of

The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard the great and essential principles of the law of nations as a part of the law of the land. Hence Congress may define those laws, but cannot abrogate them . . . .

That the laws of nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and by authority.

Id.; Edwin D. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 55-56 (1952) (“[T]he Constitution was framed in firm reliance upon the premise, frequently articulated, that . . . the Law of Nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States.”).

4. See Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 830, (1989) (“[T]he final version of that section did not include a specific reference to the law of nations, but rather parcelled matters dealing with the law of nations into the separate categories of jurisdiction now appearing in Article III.”); see also id. at 830-32 (arguing against Professor Arthur Weisburd’s view that Article III’s failure to specify law of nations as separate category signifies its not being part of “the laws of the United States”).


7. Id.

8. Scholars have posited different theories for the initial paucity of ATCA claims. Anthony D’Amato submits that “[t]he reason the Alien Tort Statute is comparatively obscure today is that it worked.” D’Amato, supra note 5, at 65 (discussing ATCA purpose of making available impartial federal judiciary for potential international disputes). The fact that Article III already covered most, if not all, of the juridical issues and subjects of international law that could be involved in an ATCA suit may offer an additional clue to solving this puzzle. See also Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 Am. J. Int’l L. 461, 470-71
the law of nations could an ATCA suit conceivably be filed by an individual for a violation of international human rights. The breakthrough ATCA case was the 1980 decision, Filartiga v. Peña-Irala. In Filartiga, the Court of Appeals for the Second Circuit held that official torture violates the law of nations, and, therefore, a noncitizen could bring suit against an alleged torturer under the ATCA. After an initially ambivalent reception, the Second Circuit’s decision soon attained a strong and diverse following. Adherents to Filartiga’s legal principles included other federal courts, the Executive Branch, the American Law Institute, and the American Bar Association. In the legal academy, Filartiga met with a similarly warm reception. A body of scholarship emerged approving of Filartiga’s modern application of the ATCA.

(1989) (discussing both Article III and the Judiciary Act’s allocation of federal jurisdiction to same issues and party structure as that covered by ATCA). Two other factors help explain the lack of suits. First, under the law of nations wing, the set of persons who could claim a law of nations violation—which only governed relations between states—was highly limited. Second, under the treaty wing, only a few treaties could apply. As Professor Randall notes, at the time of the ATCA’s enactment, only fifteen treaties were in force. Kenneth C. Randall, Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int’l L. & Pol. 1, 46 (1985).


11. Filartiga, 630 F.2d at 876. Dr. Joel Filartiga and his daughter Dolly Filartiga sued a Paraguayan Inspector General of Police for having kidnapped and tortured to death Dr. Filartiga’s seventeen-year old son. Id. at 878. The Filartigas filed suit, having discovered that they could establish personal jurisdiction to serve Inspector General Pena, who had emigrated and was residing in Brooklyn, New York. Id. at 878-79.

12. See infra Part II.C (discussing agreement in several circuits with Filartiga decision).


15. The Torture Victim Protection Act: Hearings on H.R. 1417 Before the Subcomm. on Human Rights and Int’l Org. of the House Comm. on Foreign Affairs, 100th Cong. 5-10 (1988) (statement of Father Robert Drinan, on behalf of American Bar Association); see also id. at 34-37 (statement of Alice Henkin, Chair, Committee on International Human Rights, Association of the Bar of City of N.Y.).

In 1984, however, this growing consensus was temporarily disturbed by Judge Robert Bork in a decision of the Court of Appeals for the D.C. Circuit. In *Tel-Oren v. Libyan Arab Republic*, three concurring opinions reached the same result—the rejection of an ATCA claim—for different reasons. Judge Bork’s concurrence, in particular, aroused concern because of its denial of a contemporary cause of action under the statute. The first-generation of ATCA scholars responded in force, directly disputing Judge Bork’s historical accuracy and method of statutory interpretation. This response, combined with the efforts of practitioners in the field, ultimately succeeded in winning both judicial and legislative support. In the judicial arena, other circuits chose to follow the *Filartiga* line, either implicitly or


17. 726 F.2d 774 (D.C. Cir. 1984).

18. *Id.* at 823 (Bork, J., concurring) (“[T]he three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of section 1350 will have to await clarification elsewhere . . . . [I]t is impossible to say even what the law of this circuit is.”).

19. *Id.* at 801 (“[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff [can] be allowed to enforce principles of international law in a federal tribunal.”).


21. See Michael Ratner & Beth Stephens, *Tyrants, Terrorists and Torturers Brought to Justice; U.S. Courts Provide Compensation for Victim*, N.Y. L.J., May 15, 1995, at S5 (“As of this writing, Judge Bork’s opinion is the only judicial opinion calling *Filartiga* into question. Since then every decision has supported the result reached in *Filartiga*; most have awarded substantial damages.”). A partial list of decisions embracing *Filartiga* includes: Abebe-Jira v. Negewo, 72 F.3d 844, 846-47 (11th Cir. 1996); Kadie v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996); *In re Estate of Ferdinand Marcos*, Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos*, Human Rights Litig.,
explicitly repudiating Judge Bork's position.\textsuperscript{22} And, in the legislative arena, Congress enacted the Torture Victim Protection Act (TVPA)\textsuperscript{23} in order to strengthen and clarify the ATCA in a manner which effectively overruled Judge Bork's opinion. Filartiga's success seemed complete.

A recent challenge, however, has emerged. A handful of law review articles have cast new doubt on the Filartiga doctrine. Specifically, Professors Curtis Bradley, Jack Goldsmith, and Arthur Weisburst now argue for a radical rethinking of the Filartiga line.\textsuperscript{24} These scholars claim that the Filartiga court's reasoning relies upon a flawed assumption that customary international law ("CIL") is federal common law and, as such, is actionable in U.S. federal courts.\textsuperscript{25}

Although troubled by Filartiga's understanding of CIL's status in domestic law, these scholars do not begin, but rather conclude, their analysis by considering the impact their reformation has on Filartiga and its progeny. They begin their project, more broadly, with a sweeping reconsideration of "a well-entrenched component of U.S. foreign relations law:"\textsuperscript{26} the conventional view that "customary international law [...] is part of this country's post-Erie federal common law."\textsuperscript{27} As a replacement for this conventional wisdom—what Bradley and Goldsmith call the "modern position"—they offer a fundamental reformation.\textsuperscript{28} That is, their position—which we call the

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\footnotesize

22. \textsuperscript{22}See, e.g., Forti, 672 F. Supp. at 1539 (specifically rejecting Judge Bork's position and noting "growing consensus that § 1350 provides a cause of action for certain international common law torts").


25. Bradley & Goldsmith, Customary International Law, supra note 24, at 833-34.

26. \textsuperscript{24}Id. at 816.

27. \textsuperscript{25}Id. (footnote omitted).

28. \textsuperscript{26}The acceptance of the modern position is widespread: "During the last twenty years, almost every federal court that has considered the modern position has endorsed it. Indeed, several courts have referred to it as 'settled.' The modern position
“revisionist position”—offers a radically new default rule: “[I]n the absence of federal political branch authorization, CIL is not a source of federal law.”

This Article analyzes the implications of the revisionist project for the Filartiga doctrine. We advance two related arguments: (1) Federal courts and the political branches explicitly endorse the view that, at a minimum, the scope of CIL is a federal matter; and (2) the courts and political branches also explicitly endorse the view that some definable categories of CIL—including fundamental, universally-recognized human rights—are federal common law. Our argument is simple: The consensus view that universally-recognized human rights are federal common law reflects the considered judgment of the three coordinate branches of government.

The Filartiga doctrine offers a productive site for testing the revisionist model. Locating the discussion in actual practice provides salutary conditions for evaluating the critique of the modern position. Discussions of federal common law, in particular, are better informed by an appreciation of prevailing judicial practices and restraints. In

also has the overwhelming approval of the academy.” Id. at 816-17 (footnotes omitted).

29. Id. at 870; id. at 868 (“CIL is never supreme federal law in the absence of some authorization from the federal political branches.”).

30. The revisionist position is vulnerable on several fronts; we will explore only one approach. In this sease, our argument is meant to complement the work of Professors Gerald Neuman and Beth Stephens. See Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Ford. L. Rev. 371 (1997); Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After Erie, 66 Ford. L. Rev. 393 (1997). In his trenchant critique of the revisionist position, Professor Neuman convincingly argues that: “The existence and content of rules of customary international law that are binding on the United States is to be determined as a matter of federal law. Such rules are presumptively incorporated into the U.S. domestic legal system and given effect as rules of federal law.” Neuman, supra, at 376 (footnote omitted). Professor Neuman thus provides a systematic defense of the conceptual foundations of the modern position. Beth Stephens offers a comprehensive defense of the modern position rooted in the “complex role international law has played in our legal system for over two hundred years.” (emphasis added) Stephens, supra, at 397. Stephens’s nuanced historical account underscores several gaps in the revisionist position. Our Article, in contrast, offers a critique of the modern position grounded in contemporary judicial and congressional practice. Unlike Neuman and Stephens, we accept, for the sake of argument, the revisionist default rule.

31. As Professor Martha Field counsels:

In discussions of federal common law, . . . alarms are often raised about how far courts could go—alarms similar to those raised concerning Congress’s power unlimited by any Tenth Amendment restraints. But in the situation of federal common law as well, it is important to recognize that the opportunity has not been pursued. Courts have shied away from wielding the power that in theory has been left to them.

Martha A. Field, The Legitimacy of Federal Common Law, 12 Pace L. Rev. 303, 304 (1992) [hereinafter Field, Legitimacy]. As a side note, perhaps one of the best examples of the salutary characteristics of common law is the common law of judicial restraint.
sum, evaluating the emergent critiques of CIL's incorporation into federal common law has no better practical test site than the Filartiga line—"the archetypal case of the modern genre of human rights claims." 32

In part I, by way of introduction, we outline the modern position and the revisionist challenge. In part II, we describe and discuss the modern litigation under the Filartiga line of cases. We argue that Filartiga properly followed the Supreme Court's jurisprudence on post-Erie federal common law. We also examine the modern litigation in order to provide a foundation for assessing the actual implications and effects of the modern position. In part III, we argue that the TVPA, enacted in 1992, completely insulates the Filartiga line from the revisionist challenge. We also take the position that the TVPA legislative history provides strong evidence of congressional approval of CIL's status as federal common law. While this Article principally attends to specifics of the Filartiga doctrine, in our conclusion, we suggest broader implications of our analysis for the revisionist position.

I. Framing the Debate: The Revisionist Challenge to the Modern Position

For most of the nation's history, CIL—or the "law of nations"—was indisputably part of the general common law.33 In Erie Railroad Co. v. Tompkins,34 however, the Supreme Court declared an end to general federal common law, holding that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."35 Therefore, Erie implicitly classifies all law applied in federal courts as either state or federal law.36 Although Erie did not invalidate all federal common law-mak-

34. 304 U.S. 64 (1938).
36. See Louise Weinberg, Federal Common Law, 83 Nw. U. L. Rev. 805, 820 (1989) ("At the heart of [Erie] was the positivistic insight that American law must be either federal law or state law. There could be no overarching or hybrid third option.").
The Court left unexplored the precise contours of federal
common law. As a consequence, the proper meaning and scope
of federal common law has been the subject of much debate.

37. *Erie* did not put an end to all federal common law. To the contrary, in *Hindler
v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), decided the
same day as *Erie*, the Court applied a federal common law rule regarding
interstate water disputes. The *Hindler* Court—holding that federal law
govern the dispute—recharacterized a general common law rule as a federal
common law rule. See id. at 110 (relying on general common law applied in *Kansas v. Colorado*, 206 U.S. 46, 95-98 (1907)); see also Erwin Chemerinsky, Federal Jurisdiction 331-64 (2d ed. 1994) (detailing the post-*Erie* development of federal common law in various areas); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) (describing the rise of post-*Erie* federal common law in
involving federal interests).

38. Scholarship attempting to fill this gap is abundant. Significant academic
writings on federal common law include George D. Brown, *Federal Common Law and
The Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*,
12 Pace L. Rev. 229 (1992) (discussing *Erie* and its connection to federal courts’
power to formulate federal substantive common law); Bradford R. Clark, *Federal
(1996) (proposing an approach for reconceptualizing federal common law in accord-
ance with constitutional structure); Field, *Legitimacy*, supra note 31, at 304-05 (claim-
ing that federal common law is functionally limited only by judicial restraint); Martha
887 (1986) [hereinafter Field, *Sources of Law*] (same); Friendly, *supra* note 37, at
383 (arguing that *Erie* ushered in an era of new federal common law involving issues
of national importance); Larry Kramer, *The Lawmaking Power of the Federal Courts*,
12 Pace L. Rev. 263 (1992) (defending broad view of federal common law-making
power while insisting on definite limits to its exercise); Thomas W. Merrill, *The Common
Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985) [hereinafter Merrill,
*Common Law Powers*] (proposing four principles limiting federal common law pow-
ers); Thomas W. Merrill, *The Judicial Prerogative*, 12 Pace L. Rev. 327 (1992) (discuss-
ing whether separation of powers principles in the Constitution allow federal courts to
fashion federal common law). See also Martin H. Redish, *Federal Jurisdiction: Ten-
sions in the Allocation of Judicial Power* ch. 4 (2d ed. 1990) [hereinafter Redish, *Ten-
sions*] (evaluating possible sources of the federal common law making authority).

39. See *supra* note 38. Discussions of federal common law often include some
dispute over the meaning of “federal common law.” Generally, federal common law
refers to federal rules of decision fashioned in the absence of express political branch
authorization. For other definitions, see Brown, *supra* note 38, at 230-31 (defining
federal common law as “any rule of federal law created by a court (usually but not
invariably a federal court)” pertaining to substantive matters, but not to jurisdictional
or procedural matters); Field, *Sources of Law*, *supra* note 38, at 890 (defining fed-
eral common law as “any rule of federal law created by a court . . . when the sub-
stance of that rule is not clearly suggested by federal enactments” (emphasis in original));
Kramer, *supra* note 38, at 267-69 (defining federal common law as including “any rule
articulated by a court that is not easily found on the face of an applicable statute”);
Merrill, *Common Law Powers*, *supra* note 38, at 7 (defining federal common law as
substantive or procedural federal rules “not found on the face of an authoritative
federal text”). Many commentators note the striking similarities between common
law and statutory interpretation. See Brown, *supra* note 38, at 231 (arguing that fed-
eral common law making and statutory interpretation are similar but distinguishable);
Kramer, *supra* note 38, at 267-69 (explaining that “interpretation shades impercepti-
bly into judicial lawmaking”); Martin H. Redish, *Federal Common Law, Political Le-
Rev. 761, 794 (1989) (“While gray areas will appear, it should not be all that difficult
sweep of this debate has not however, until recently, included disputes over the status of CIL—international law norms not explicitly incorporated into any federal statute or treaty—as federal common law. The consensus view, which Professors Bradley and Goldsmith call the “modern position,” has maintained that CIL is part of the post-Erie federal common law. The emergent challenge to the modern position, which we call the “revisionist position,” questions the foundations of this view and claims that this consensus “is the result of a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the Restatement (Third) of Foreign Relations Law, and academic fiat.” The revisionist critique of the modern position culminates in a proposed default rule for the incorporation of CIL as federal law: “[I]n the absence of federal political branch authorization, CIL is not a source of federal law.”

A. The Modern Position

The modern position maintains that CIL is federal common law. After Erie, CIL is clearly not part of the general common law; leaving open the question: What is the post-Erie status of CIL in U.S. law? Although not explicitly analyzing CIL’s status in domestic law, Erie’s holding suggests two possibilities: state law or federal common law.

In the period between Erie and the Supreme Court’s decision in Banco Nacional de Cuba v. Sabbatino, courts and commentators
to distinguish permissible true statutory ‘interpretation’ from prohibited creative judicial law making.” (footnote omitted)); Weinberg, supra note 36, at 807 (claiming that there is “no useful theoretical dividing line” between common law and statutory interpretation).

40. See Bradley & Goldsmith, Customary International Law, supra note 24, at 817-22.

41. See id. at 816 n.2. Bradley and Goldsmith write: We use the term ‘modern’ to signify that widespread endorsement of this view occurred only recently. We use the term ‘position’ to signify that there is substantial agreement that CIL has the status of federal common law, not to signify that all those who adopt this position are in agreement regarding its rationales or implications.

42. Id. at 821.

43. Id. at 870.

44. See infra note 53.

45. But see Weisbord, State Courts, supra note 24, at 48-51 (claiming that CIL should be considered neither state nor federal law).


47. Only one federal court directly addressed the post-Erie status of CIL. See Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948) (applying state court’s interpretation of international law). The court did, however, qualify its holding in language that presaged the Supreme Court’s reasoning in Sabbatino. See id. at 361 (“Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here.”).

48. Two prominent scholars advocated the modern position in this period. See Edwin D. Dickinson, The Law of Nations as Part of the National Law of the United
provided little guidance on the issue. In *Sabbatino*, the Supreme Court—quoting Judge Jessup’s warning that *Erie* should not apply to international law—clearly announced “foreign affairs” as an enclave of federal common law. Many commentators suggested that the holding in *Sabbatino*—the most on point post-*Erie* Supreme Court opinion discussing the federal common law status of transnational legal issues—implicitly supported the modern position.

The Court’s holding in *Sabbatino* was the precursor to what Professors Bradley and Goldsmith call the “twin pillars” of the modern position: *Filartiga* and the Restatement (Third) of Foreign Relations Law. In *Filartiga*, the Second Circuit Court of Appeals held that non-diverse applications of § 1350, the Alien Tort Claims Act, do not violate Article III of the Constitution since CIL is part of the federal common law. The American Law Institute, in the Restatement (Third) of Foreign Relations Law, also unambiguously endorsed the modern position that CIL is federal common law. Partially as a result of these developments, a consensus developed among commenta-

*States*, 101 U. Pa. L. Rev. 26, 49 (1952) (arguing from an historical perspective that the “law of nations” is post-*Erie* federal law); Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int’l L. 740 (1939) (arguing that international law is post-*Erie* federal law).

49. See Jessup, *supra* note 48, at 741.

50. 376 U.S. at 425-27; *see also infra* Parts II.A & IV.A.


52. See Bradley & Goldsmith, *Customary International Law*, *supra* note 24, at 849.

We also claim that the TVPA is properly understood as a “third pillar” of the modern position. *See infra* Part III.

53. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (“[I]nternational law has an existence in the federal courts independent of acts of Congress . . . .”); id. at 885 (“[T]he law of nations . . . has always been part of the federal common law.” (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900) and *The Neirinck*, 13 U.S. (9 Cranch) 388, 422 (1815))). Bradley and Goldsmith offer an explanation of the importance of the *Filartiga* court’s holding that CIL is federal common law:

*Filartiga* is significant for present purposes because of its . . . holding concerning the constitutionality of the ATS . . . . [T]he Article III basis for federal jurisdiction in *Filartiga* was questionable. The parties were not diverse, and the case did not arise under either a treaty or a federal statute. But there was another possibility, for federal question jurisdiction also extends to cases that arise under federal common law.

Bradley & Goldsmith, *Customary International Law*, *supra* note 24, at 833 (citations omitted).

54. See Restatement (Third), *supra* note 14, at § 111 cmt. d, § 115 cmt. e; id. at § 111 reporter’s note 3 (“Based on the implications of *Sabbatino*, the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”).
tors\textsuperscript{55} and courts\textsuperscript{56} that CIL is a post-\textit{Erie} enclave\textsuperscript{57} of federal common law. That is, in the last twenty years, the modern position has become the consensus view.

\begin{footnotesize}
\begin{enumerate}
\item[56.] See Bradley & Goldsmith, \textit{Customary International Law}, supra note 24, at 817 ("[A]lmost every federal court that has considered the modern position has endorsed it."); \textit{see, e.g., Kadic v. Karadzic}, 70 F.3d 232, 246 (2d Cir. 1995) (describing the "settled proposition that federal common law incorporates international law"), \textit{cert. denied}, 116 S. Ct. 2524 (1996); \textit{In re Estate of Ferdinand Marcos}, Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994); \textit{In re Estate of Ferdinand E. Marcos}, Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuneaux v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995) ("It is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law."); United States v. Schiffer, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), \textit{aff'd mem.}, 31 F.3d 1175 (3d Cir. 1994); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), \textit{reh'g granted on other grounds}, 694 F. Supp. 707 (N.D. Cal. 1988); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), \textit{aff'd on other grounds}, 654 F.2d 1382 (10th Cir. 1981).\textsuperscript{57}
\item[57.] Federal common law making authority is often described in terms of "enclaves." \textit{See, e.g., Redish, Tensions, supra note 38, at 125-48} (describing "areas" of federal common law making authority). Several commentators are critical of this approach. \textit{See, e.g., Weinberg, Federal Common Law, supra note 36, at 812} ("We will not be misled by lists of 'federal enclaves' chronically offered by courts and writers, lists of discrete topics upon which the nation's lawmakership power is supposedly confined in its courts." (footnotes omitted)).
\end{enumerate}
\end{footnotesize}
The "collateral" doctrinal consequences of the modern position remain less obvious. Clearly, federal interpretations of CIL preempt inconsistent state law under the Supremacy Clause. Additionally, federal court jurisdiction under Article III of the Constitution would extend to cases "arising under" CIL. Other potential doctrinal consequences include: (1) Federal CIL may bind the President under the Take Care Clause; and (2) federal CIL may supersede prior inconsistent federal statutes. These potential doctrinal implications do not, however, necessarily follow from the modern position. First, no federal court endorsing the modern position has endorsed these applications of the modern position. Second, and more important, the political branches retain the capacity to qualify the incorporation of CIL into federal common law through executive orders, treaties, or federal legislation. Third, not all federal CIL is actionable in federal courts. As we argue below, actionable federal CIL is limited to universal norms, such as torture and extrajudicial killing. Therefore, only universally recognized CIL might be enforceable against the U.S. federal government.

58. See Bradley & Goldsmith, Customary International Law, supra note 24, at 834.
59. See U.S. Const. art. VI, cl. 2 ("Laws of the United States . . . shall be the supreme Law of the Land."); see also Boyle v. United Technologies Corp., 487 U.S. 300, 504 (1988) (reciting that "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts—so-called 'federal common law'" (citation omitted)); Merrill, Common Law Powers, supra note 38, at 6-7 ("Federal common law . . . is federal law. Consequently, the Supreme Court is the final arbiter of its content, and the resulting rules are binding on the state courts under the Supremacy Clause of the Constitution."); Brilmayer, supra note 55, at 342.
60. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States . . . .").
61. See U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . ."). Some advocates of the modern position defend this view. See, e.g., Henkin, The President and International Law, supra note 55, at 934-36; Glennon, supra note 55, at 332.
62. See, e.g., Henkin, Chinese Exclusion, supra note 55, at 875-78 (advocating a last-in-time rule).
63. See Bradley & Goldsmith, Customary International Law, supra note 24, at 821, 838-48. Professors Bradley and Goldsmith maintain that federal courts have considered the modern position only in "jurisdictional contexts," and as such, these courts have not had the occasion to evaluate the full doctrinal implications of the modern position. See id. at 821. We disagree. Indeed, as Bradley and Goldsmith point out, federal courts have upheld the constitutionality of § 1350 by finding that CIL—as a matter of substantive law—is part of the laws of the United States for the purposes of Article III. See id. at 833-34.
64. See infra Parts II, II-A, & IV (arguing that only universally recognized CIL is actionable in U.S. courts).
B. The Revisionist Challenge

The revisionists challenge the "well-entrenched" proposition that CIL is federal law. The revisionist position engages the modern position along two axes. First, the revisionists dispute the foundations, or "pillars," of the modern position, and second, the revisionists suggest that the values of democracy, separation of powers, and federalism counsel against the modern position. Motivated by these concerns the revisionists fashion a new default rule governing the incorporation of CIL into federal law.

The revisionists scrutinize and reject the "twin pillars" of the modern position. First, the revisionists reject the Second Circuit's holding in Filartiga. According to the revisionist approach, the Filartiga court's reliance on pre-Erie precedents is unwarranted and inconclusive. The revisionists claim that nineteenth-century case law cannot support the finding that CIL is federal common law. The oft-quoted passages from The Paquete Habana and The Nereide stand only for the proposition that CIL was part of the pre-Erie general common law. Filartiga's reliance on these cases to support its finding that CIL is part of the post-Erie federal common law is misplaced since these cases can offer no such support for that conclusion.

The revisionists also maintain that The Restatement (Third) of Foreign Relations Law fails to document its conclusion that CIL had assumed the status of federal law. According to the revisionist view, the only case supporting the modern position before the release of the draft Restatement (Third) was Filartiga. As such, the revisionists conclude that the Restatement (Third) provides no independent support for the modern position.

Additionally, the revisionists claim that the Supreme Court's holding in Sabbatino provides no basis for the modern position. In support of this claim, the revisionists offer an alternative reading of the Court's reasoning in Sabbatino. According to the revisionist view, the Sabbatino Court's holding stands only for the proposition that courts lack the institutional competence to adjudicate matters relating to for-

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65. See Bradley & Goldsmith, Customary International Law, supra note 24, at 816.
66. See id. at 831-34; Weisburd, State Courts, supra note 24, at 28-37.
67. See Bradley & Goldsmith, Customary International Law, supra note 24, at 834.
68. The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law. . . ").
69. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (stating that the "law of nations" is the "law of the land").
70. See Bradley & Goldsmith, Customary International Law, supra note 24, at 834.
71. See id. at 834-37.
72. See id. at 836.
73. See id. at 837-38.
74. See id. at 859-60; Weisburd, State Courts, supra note 24, at 43-44; Weisburd, Executive Branch, supra note 24, at 1241.
eign affairs. In their view, the Court’s reasoning turns on separation of powers concerns rather than concerns about the federal law status of CIL. As such, the revisionists maintain that the Sabbatino Court fashioned a federal common law of judicial restraint, rather than a “federal common law of foreign relations.”

The revisionist position not only disputes the modern position’s doctrinal underpinnings, but also questions the modern position’s broader implications. In evaluating the potential implications of the modern position, the revisionists highlight the changing nature and role of CIL.

Two concerns structure their approach. First, the revisionists lament the fact that international law increasingly purports to regulate “many areas that were formerly of exclusive domestic concern.” Second, the revisionists describe the “new CIL” as governing an ever-broadening range of jurisdictional relationships, emerging quickly, and far less consent-based than traditional CIL. That is, the revisionists warn against the federalization of a body of law that regulates a broad range of public and private action and develops without the input of U.S. political branches.

Thus, the revisionists conclude that the changing nature of CIL generates many disturbing doctrinal implications of the modern position: (1) Federal CIL would preempt an increasingly (and unacceptably) broad range of state laws; (2) federal CIL would involve federal

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75. See Bradley & Goldsmith, Customary International Law, supra note 24, at 829-30; Weisburd, State Courts, supra note 24, at 44; Weisburd, Executive Branch, supra note 24, at 1241-42.

76. See Bradley & Goldsmith, Customary International Law, supra note 24, at 859-60; Weisburd, State Courts, supra note 24, at 44; Weisburd, Executive Branch, supra note 24, at 1240-42.

77. See Bradley & Goldsmith, Customary International Law, supra note 24, at 860.

78. Id. at 821.

79. See id. at 838-42.

80. See id. at 839-40.

81. See id. at 840-41.

82. See id. at 839-40.

83. See id. at 846-47. This argument is not new to federal common law scholars. Indeed, broad-based limitations on the federal common law making authority are often fashioned to vindicate federalism. As such, federalism concerns pervade federal common law scholarship. See Kramer, supra note 38, at 290-92 (explaining federalism-based objection to federal common law); id. at 300 (“[T]o the extent that federal common law is made to improve the effectiveness of a federal statute, the states have a weaker objection than when Congress has not acted.”). Professor Lund argues: “[F]ederalism-based objections are overcome when Congress, having determined that federal regulation is necessary, has acted to federalize an area of the law. States presumably have had their say in the congressional debate.

It is within federal judicial power to fashion federal rules of decision necessary to make the federal statute or program work.

Paul Lund, The Decline of Federal Common Law, 76 B.U. L Rev. 895, 1004 (1996) (citations omitted); see also Merrill, Common Law Powers, supra note 38, at 18 (arguing that federalism arguments are relevant only when federal law interferes with state interests).
courts in issues best left to the political branches; and (3) federal CIL would potentially invalidate democratically-produced U.S. political branch action with which it is inconsistent. These concerns, according to the revisionist approach, counsel against the wholesale incorporation of CIL into federal common law. To avoid these doctrinal consequences, they suggest an alternative to the modern position; a revisionist default rule governing the incorporation of CIL into U.S. law: Absent political branch authorization, CIL is not federal law.

The doctrinal implications of the revisionist position are no less settled than those of the modern position. Professors Bradley and Goldsmith suggest that the changes in current judicial practice would be slight. Two doctrinal changes, however, merit closer scrutiny. First, CIL—absent political branch authorization—would be subject to the potentially divergent interpretations of the fifty states. Second, the ongoing § 1350 litigation—the Filartiga line—might be adversely affected. According to the revisionist account, Filartiga and its prog-

84. See Bradley & Goldsmith, Customary International Law, supra note 24, at 844-46. Professor Lund has summarized the “separation of powers” limitation on federal common law:

Separation of powers principles also do not require a federal court to incorporate state law as the federal common law rule of decision. The separation of powers arguments are of two types: first, that federal courts would be intruding on federal legislative authority by creating their own federal rules of law, and second, that federal courts lack the institutional competency to “make law.”

Lund, supra note 83 at 1008-09. Professor Lund goes on to reject the “separation of powers” objection:

The typical case of federal common law making, in which the court must fill a gap in a federal statutory scheme, involves no invasion of the law making sphere reserved to Congress . . . . Sometimes Congress intentionally leaves remedial gaps for the courts to fill; more commonly Congress failed to address the question because the matter did not occur to Congress at the time . . . . Whether the federal court looks for and adopts a supposedly analogous state law rule to fill the gap, or instead tries to create a federal rule Congress might have adopted, neither requires the court to enter the domain reserved to Congress.

Lund, supra note 83, at 1009.

85. See Bradley & Goldsmith, Customary International Law, supra note 24, at 857-58, 868-69.

86. See id. at 868, 870; Bradley & Goldsmith, Human Rights Litigation, supra note 24, at 319.

87. See Bradley & Goldsmith, Customary International Law, supra note 24, at 871-74.

88. See Henkin, supra note 51, at 238 (“Fifty states could have fifty different views on some issue of international law and the federal courts might have still another view.”).

89. Bradley and Goldsmith claim that the repudiation of the modern position need not disturb the ongoing ATCA litigation:

[If CIL is not federal common law, then the Article III basis for federal jurisdiction over suits involving only aliens—the large majority of international human rights suits under the ATS—is suspect. But rejection of the modern position would not necessarily spell the end for Filartiga-type litigation, for two reasons. First, there might be justifications other than the mod-
eny have mistakenly relied upon the modern position in upholding Article III constitutionality of alien-alien suits under § 1350 and in fashioning federal CIL-based causes of action without congressional authorization. 90 Therefore, the revisionist position could potentially have drastic implications for the Filartiga line. These potential adverse consequences are the point of departure for our analysis.

The balance of this Article analyzes two related issues: the implications of the revisionist default rule for the Filartiga line, 91 and the implications of the Filartiga line for the revisionist project. 92 We advance two related claims. First, the ongoing human rights litigation under § 1350 is immune from the effects of the revisionist default rule. Second, the nature of § 1350’s immunity illustrates deep-seated deficiencies in the revisionist project.

II. FEDERAL COURT ENDORSEMENT OF THE MODERN POSITION: THE STRUCTURE OF THE MODERN LITIGATION

The structure of controlling case law lends little support to the revisionist critique. In this part, we describe and analyze the modern position in contemporary federal jurisprudence emphasizing the limits of the judiciary’s willingness to incorporate CIL as judicially cognizable claims. This discussion allows us to consider the actual legal ramifications of the modern position. While the revisionist critique cautions against the wholesale incorporation of CIL into federal common law, this part demonstrates the nature of CIL norms that courts actually

90. See Bradley & Goldsmith, Customary International Law, supra note 24, at 871-73.
91. See infra text accompanying notes 96-116.
92. See infra text accompanying notes 117-59.
deem judicially cognizable as U.S. domestic law. Our position is easily summarized: First, federal courts have properly recognized that all international law is presumptively a federal matter and, second, federal courts have elaborated a sound analytical framework limiting the application of international law in U.S. courts. In short, the Filartiga line of cases, following the Supreme Court’s reasoning in Sabbatino, appropriately fashions a federal common law of universal human rights norms.

A. Sabbatino and CIL’s Status as Federal Common Law

Filartiga fits neatly within the Supreme Court’s federal common law jurisprudence. Admittedly, the Filartiga court did not explicitly reconcile the ATCA with the post-Erie constraints on federal common law. The prevailing view of Erie’s non-applicability in foreign affairs cases, however, removed such issues from the decisional calculus. The Supreme Court had provided clear controlling precedent on the matter well after Erie’s doctrinal shockwaves had reorganized the Court’s understanding of federal common law. We defend two related propositions. First, Filartiga’s finding that torture is actionable as federal law flowed quite reasonably from the leading federal common law case in foreign affairs, Banco Nacional de Cuba v. Sabbatino. Second, the Supreme Court’s reasoning in Sabbatino provides broad support for the Filartiga court’s claim that CIL is federal common law.

1. Delimiting the Courts’ Role: Sabbatino’s “Sliding Scale”

Sabbatino has informed the Filartiga doctrine in a pivotal way: Sabbatino structures the federal courts’ understanding of the scope of actionable CIL in U.S. courts. The Sabbatino Court’s holding—that the act of state doctrine prevents U.S. courts from examining the validity of a foreign government’s expropriations in the absence of a treaty or other unambiguous agreement—has implicitly defined the boundaries of actionable CIL under § 1350.

The issue in Sabbatino was whether the act of state doctrine precluded courts from determining if the Cuban government’s expropria-

93. This comprehensive account of the case law should provide a practical understanding of the boundaries of Filartiga’s doctrinal effect. This part’s discussion should also help alleviate concerns about the potential over-expansiveness of the federal common law of CIL. Here, we discuss the distinction between CIL, in general, and its more limited subset of actionable jus cogens violations. We also examine the exact international law claims that are raised and the methods by which courts evaluate them. This discussion analyzes the case law’s built-in regulations that secure against the revisionists’ prognostications.

94. Discussing the applicability of federal common law would have been highly unusual in a case like Filartiga. Such reasoning would have raised a non issue. In fact, no dissent from the Filartiga line has ever argued that the ATCA presents Erie difficulties.

tion of alien property violated international law. Justice Harlan, writing for the majority, held first, that the act of state doctrine constituted a domain of federal common law and, second, that this doctrine prevented U.S. courts from examining the validity of a foreign government's taking of property in the absence of a treaty or other unambiguous agreement.

The Supreme Court fashioned a federal rule of decision to govern the scope of judicial incorporation of international law. Both the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals had passed on the legal legitimacy of the Cuban government's act of expropriation under international law—an unheralded move. Both lower federal courts recognized that courts of the United States must expound and develop international law when it is appropriate to do so. Not surprisingly, proponents of the modern position initially viewed the outcome of the Supreme Court case as a significant setback.

The Sabbatino Court explained that the lower courts had erred because of the nature of private property expropriation—a principle of international law over which countries of different political ideologies could reasonably disagree. Indeed, questions over private property and rights of governmental seizure were highly contentious issues on the international plane. Of no small relevance, the litigation was set against the backdrop of a world deeply divided along communist

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96. Id. at 400-01.
97. Id. at 425.
98. Id. at 428.
100. Sabbatino, 193 F. Supp. at 380 (“Apparently, no court in this country has passed on the question.”).
101. Sabbatino, 307 F.2d at 861 (“[U]ntil the day of capable international adjudication among countries, the municipal courts must be the custodians of the concepts of international law, and they must expound, apply and develop that law whenever they are called upon to do so.” (citation omitted)); 193 F. Supp. at 381-82 (“Courts of this country have the obligation to respect and enforce international law not only by virtue of this country’s status and membership in the community of nations but also because international law is a part of the law of the United States.” (citation omitted)); cf. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J., concurring):

Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving an ‘act of state’ is relegated to political rather than judicial processes.
102. See Koh, supra note 10, at 2363.
103. Sabbatino, 376 U.S. at 430. The Court of Appeals may have anticipated this mistake. 307 F.2d at 861 (“One pitfall into which we could stumble would be the identification as a fundamental principle of international law of some principle which in truth is only an aspect of the public policy of our own nation and not a principle so cherished by other civilized peoples.”).
104. See infra note 243 and accompanying text.
and capitalist ideologies, and the particular facts of the case grew directly out of a protracted trade dispute between Cuba and the United States.\textsuperscript{105} We contend that had the case turned on a violation of \textit{jus cogens}, the results would have been entirely different. Consider how the Court's reasoning would have changed had the alleged CIL violation been genocide or official torture, a universally condemned practice. According to \textit{Sabbatino}'s reasoning\textsuperscript{106}—reaffirmed in the \textit{Restatement (Third)}\textsuperscript{107}—judicial incorporation of CIL for such claims would survive the act of state doctrine.

In this way, the \textit{Sabbatino} Court established a "sliding scale."\textsuperscript{108} That is, the greater degree of codification and consensus supporting a CIL norm, the more allowance courts have in finding attendant claims actionable:

> It should be apparent that the greater degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle consistent with the national interest or with international justice.\textsuperscript{109}

This framework thus distinguishes between two types of international law: (1) areas of international law in which the requisite consensus is missing—such as expropriations—because countries are politically divided on the issue; and (2) "areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies."\textsuperscript{110}

The latter area of international law, the \textit{Sabbatino} Court explained, is properly justiciable, since it allows courts to comport with the "constitutional" underpinnings of the act of state doctrine.\textsuperscript{111} The revisionist position, however, contends that the Court's federal common law rule stands for a doctrine of judicial deference, if not abstention.

\textsuperscript{105} \textit{Sabbatino}, 376 U.S. at 401-05. The expropriation of respondent's property was justified by the Cuban government as part of its direct response to the U.S. Sugar Act. \textit{Id.} at 402-03.

\textsuperscript{106} \textit{Id.} at 430 n.34 ("There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.").

\textsuperscript{107} \textit{See Restatement (Third), supra} note 14, at § 469 cmt. c.

\textsuperscript{108} Von Dardel \textit{v.} Union of Soviet Socialist Republics, 623 F. Supp 246, 258 (D.D.C. 1985) (explaining that in \textit{Sabbatino} "the Court established a sort of sliding scale with respect to judicial application of international law").

\textsuperscript{109} \textit{Sabbatino}, 376 U.S. at 428.

\textsuperscript{110} \textit{Id.} at 430 n.34; \textit{see also id.} at 467 n.26 (White, J., dissenting) ("[S]ubsequent cases not involving expropriations will require us to determine if the act of state doctrine applies and the Court's standard is the strength and clarity of the principles of international law thought to govern the issue.").

\textsuperscript{111} \textit{Id.} at 423.
A unanimous Supreme Court, on the contrary, recently explained, "[t]he act of state doctrine is not some vague doctrine of abstention but a 'principle of decision'..."113 In W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,114 the Court rejected an act of state defense, reiterating that "in Sabbatino... we observed that sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application. We suggested that a sort of balancing approach could be applied..."115 In this way, the Court itself has broadly described Sabbatino as establishing the enclave of federal common law of foreign relations,116 a designation that Bradley and Goldsmith seem to resist.117 In sum, the proper interpretation of Sabbatino is not that the act of state doctrine pre-

112. See Bradley & Goldsmith, Customary International Law, supra note 24, at 861 ("Sabbatino's federal common law analysis was designed to shield courts from involvement in foreign affairs."); id. at 868 ("The Supreme Court's modern federalism jurisprudence suggests the broader conclusion that CIL is never supreme federal law in the absence of some authorization from the federal political branches."); Weisburd, State Courts, supra note 24, at 46 ("Even Sabbatino supported this limited view of judicial authority; it refused to apply customary international law because doing so might have interfered with the workings of the Executive.").


114. Id.

115. Id. at 409.


[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with... international disputes implicating the conflicting rights of States or our relations with foreign nations... In these instances, our federal system does not permit the controversy to be resolved under state law... because the... international nature of the controversy makes it inappropriate for state law to control.

117. Bradley & Goldsmith, Customary International Law, supra note 24, at 831 (quoting Louis Henkin, Foreign Affairs and the Constitution 219, 273 (1972) and John Norton Moore, Federalism and Foreign Relations, 1965 Duke L.J. 248, 273); id. at 864 ("[S]cholars interpreted Sabbatino broadly to 'establish[ ] foreign affairs as a domain in which federal courts can make law with supremacy'—the so-called 'federal common law of foreign relations.'") (quoting Stephen B. Burbank, Federal Judgments Law: Sources of Authority and Sources of Rules, 70 Tex. L. Rev. 1551, 1577 (1992)); id. at 864:

Sabbatino is best regarded not as authority for an expansive federal common law of foreign affairs but rather for the power of the federal judiciary to make uniformly applicable rules (the act of state doctrine) designed to protect courts from entanglements in, and interbranch conflicts about, matters for which they are not institutionally suited.

Id. (quoting Burbank, supra, at 1577); id. at 864 n.309 (explaining that Texas Industries, 451 U.S. at 641, only "referred to a federal common law of foreign relations in dictum").
cludes all CIL—as Bradley and Goldsmith suggest. Rather, the doctrine precludes only those domains of public international law that hold either a disputed, inchoate, or undefined status. Yet, if all deficiencies are resolved—that is, if a claim is based on obligatory, universal, and well-defined CIL—Sabbatino does not foreclose the law's application.

2. Sabbatino's Embrace of the Modern Position

The Supreme Court's reasoning in Sabbatino also provides strong support for the proposition that CIL is federal common law. In this section, we highlight three important ways in which the Sabbatino reasoning reflects the Supreme Court's endorsement of the modern position. First, the Court's logic applies to CIL as well as the act of state doctrine. Second, the structure of the Court's reasoning including the evidence marshalled to support its conclusions supports the modern position. Third, the Court authorizes federal courts to fashion common law rules in the area of foreign relations.

a. Sabbatino's Logic Supports the Modern Position

Applying the Sabbatino Court's federal common law analysis to CIL provides a sound conceptual basis for the modern position. In Sabbatino, the Court's description of federal common law fortified support for the modern position that CIL is part of federal common law.

In particular, the Sabbatino Court announced two fundamental features of federal common law—unique federal interests and the need for

118. Bradley & Goldsmith, Customary International Law, supra note 24, at 828-29 ("In Sabbatino, the Supreme Court held that there was no exception to the act of state doctrine for acts of state that violated CIL."); see also id. at 860.

119. In contrast to Bradley and Goldsmith's interpretation, our understanding of Sabbatino more adequately explains Justice White's dissenting statement that the Court had "declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases." 376 U.S. at 439 (White, J., dissenting). Indeed, the Court had eliminated from consideration a "category of [international law] cases," though not all international law (and not ambiguous and universal CIL). Id. Bradley and Goldsmith's use of Justice White's statement to support their expansive claims thus misses the mark. Compare Bradley & Goldsmith, Customary International Law, supra note 24, at 860 (using Justice White's statement to demonstrate that Sabbatino implies CIL is beyond court jurisdiction without political branch authorization), with Sabbatino, 376 U.S. at 467 n.26 (White, J., dissenting) ("[S]ubsequent cases not involving expropriations will require us to determine if the act of state doctrine applies and the Court's standard is the strength and clarity of the principles of international law thought to govern the issue."). Finally, in a subsequent decision which rejected an act of state defense, Justice White, who delivered the plurality opinion, quoted Sabbatino's sliding-scale paragraph in full. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976). He explained that in the matter at hand—principles of restrictive immunity for commercial activities of states—"discernible rules of international law" governed in contrast to the rules of law concerning expropriations in which "[t]here may be little codification or consensus." Id. at 704.
for national uniformity. CIL determinations exhibit both features. The first facet of federal common law analyzed in Sabbathino—unique federal interests—are premised upon the delicacy of adjudicating the acts of foreign governments.\textsuperscript{120} Here, the Court recognized that deciding to evaluate whether a foreign government’s action violates international law raises two uniquely federal concerns: the federal separation of powers and the country’s “pursuit of goals . . . for the community of nations as a whole in the international sphere.”\textsuperscript{121}

The second facet of federal common law—national uniformity—concerns the country’s need to respond with unity to the global community on matters of international law. Or as Judge Jessup put it: “The duty to apply [international law] is one imposed upon the United States as an international person.”\textsuperscript{122} On this point, the Sabbathino Court recognized—since the act of state doctrine does not rest on a statute—they had to find other parallels.\textsuperscript{123} Toward this end, the Court cited the example of managing equitable apportionment of interstate waters\textsuperscript{124}—a legal issue that requires a unified national response and that has been an enclave of federal common law since the day 	extit{Erie} was decided.\textsuperscript{125}

The Court also found support for this framework in various constitutional and statutory provisions “reflecting a concern for uniformity in this country’s dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.”\textsuperscript{126} What constitutional and statutory provisions could the Court rely on to establish this understanding of federal common law? Among other provisions, the Court relied on Article I, which grants Congress the power to define and punish offenses against

\textsuperscript{120} See Sabbathino, 376 U.S. at 424.
\textsuperscript{121} Id. at 423. Accordingly, as Justice Harlan explained, allowing each of the fifty states to develop their own body of law would collapse the possibility of balancing these federal concerns:

[I]t is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

\textit{Id.} at 424.
\textsuperscript{122} Jessup, supra note 48, at 743.
\textsuperscript{123} Sabbathino, 376 U.S. at 426.
\textsuperscript{124} Id. at 426-27.
\textsuperscript{125} The Court discussed Hinderlider \textit{v. La Plata River Co.}, 304 U.S. 92 (1938), a decision rendered the same day as 	extit{Erie} which announced the federal common law enclave for interstate water disputes. 	extit{Erie}, 376 U.S. at 426-27. Notably, this area of the law has a well-accepted tradition of incorporating international law as federal common law to resolve interstate disputes. See Field, \textit{Sources of Law}, supra note 38, at 916 (“In exercising its power [in interstate controversies], the Court has been guided largely by principles of international law . . . ”).
\textsuperscript{126} Sabbathino, 376 U.S. at 427 n.25.
the law of nations and § 1350's Alien Torts Claims Act. This understanding of the federal common law pronouncement in Sabbatino has not been lost on federal courts in ATCA cases; several opinions have found guidance in the Court's use of the ATCA to support Sabbatino's federal common law holding.

127. Id. Indeed, scholarship on the ATCA's history supports this understanding; the ATCA grew out of a need to have the federal government respond uniformly in its dealings with foreign nations. In 1781, the Continental Congress passed a resolution, which is regarded as an early model of the ATCA. See Burley, supra note 8, at 476 (discussing 21 J. of the Continental Cong. 1136-37 (1781)); William R. Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 490-91, 495 (1986) (same). The resolution, however, was merely suggestive; it lacked meaningful authority over the states due to the minimal power the Congress held under the Articles of Confederation. In the years preceding the 1781 Resolution and the passage of the ATCA, two relevant foreign affairs debacles occurred. The majority view is that these two events probably motivated the First Congress's adoption of the ATCA. See Cicero, supra note 55, at 334-36; Randall, supra note 8, at 24-28; cf. D'Amato, supra note 5, at 63 (acknowledging particular incidents but calling attention to national security interests as a broader, "overriding purpose" of ATCA). But see Burley, supra note 8, at 475-92 (arguing that overriding purpose was sense of national duty to honor international law). Both events concerned an offense committed against a foreign ambassador in violation of the law of nations, one committed by another foreign national—"the Marbois Affair"—and the other by a U.S. official—"the Van Berkel Incident." In both instances, the states initially failed to address the issue adequately. See Casto, supra, at 491, 494. In the wake of the Marbois Affair, foreign ministers "demanded that Congress declare the law of nations to be part of the common law of each of the states." Randall, supra note 55, at 24 (quoting Rosenthal, The Marbois-Longchamps Affair, 63 Pa. Mag. His. 294, 294 (1939)). Disabled by the Articles of Confederation, the Continental Congress commissioned John Jay, as Secretary for Foreign Affairs, to inform foreign delegates of its legislative incapacities. 28 J. of the Continental Cong. 374 (resolution of Apr. 27, 1785) (J. Fitzpatrick ed. 1933). The Congress had to content itself with recommending to the states that they pass legislation to punish future threats to the "dignity of sovereign powers in the person of their ministers or servants." Id. When the Van Berkel incident later arose, Jay reported back to the Continental Congress that lack of federal power remained and the Congress could merely urge New York to institute judicial proceedings. See Casto, supra, at 494 n.152. The ATCA repaired these federal infirmities.

128. In re Estate of Ferdinand E. Marcos, Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) (exalping that district court used Sabbatino footnote 25 to support an approach which "comports with the view that the First Congress enacted the predecessor to § 1350 to provide a federal forum for transitory torts (a tort action which follows the tortfeasor wherever he goes), whenever such actions implicate the foreign relations of the United States" (citation omitted)); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 790-791 (D.C. Cir. 1984) (Edwards, J., concurring) ("the Supreme Court has at least twice cited section 1350 as a statutory example of congressional intent to make questions likely to affect foreign relations originally cognizable in federal courts," citing Sabbatino, 376 U.S. at 427 & n.25; Ex parte Quirin, 317 U.S. 1, 27-30 & n.6 (1942)); Xuncax v. Gramajo, 886 F. Supp. 162, 182 (D. Mass. 1995) (citing Sabbatino's footnote 25 to support the proposition that "by not tethering § 1350 to causes of action and remedies previously developed under roughly analogous municipal law, the federal courts will be better able to develop a uniform federal common law response to international law violations, a result consistent with the statute's intent in conferring federal court jurisdiction over such actions in the first place"); Forti v. Suarez-Mason, 872 F. Supp. 1531, 1540 n.6 (N.D. Cal. 1997) (citing footnote 25 as further support that "Congress intended § 1350 to provide concurrent federal jurisdic-
Bradley and Goldsmith deny that the "logic of [Sabbatino's] federalization of the act of state doctrine applies equally to the status of CIL." Specifically, Bradley and Goldsmith assert that this analogy should not extend to the "new CIL of human rights" given the political branches' conditional assent to human rights treaties. This claim is not responsive, however. Our position is not that Sabbatino endorses the wholesale incorporation of the "new CIL of human rights." Rather, we maintain that universally recognized human rights norms are incorporated as federal common law. As our discussion of the Sabbatino Court's "sliding scale" demonstrates, the Court found no separation of powers difficulties in applying such norms. In addition, as we discuss in some detail in part III, the political branches also endorse the federal common law of universal human rights. Finally, the broadening scope of "new CIL" cautions against relaxing federal control over CIL. That is, U.S. relations with other nations, the citizens of other nations, and its own citizenry is increasingly governed by international legal principles. The content of international legal norms will therefore increasingly structure foreign relations. As such, the need for the United States "to speak with one voice" on international law is correspondingly increased.

b. Sabbatino's Reliance on Judge Jessup's Defense of the Modern Position

In pronouncing foreign relations a post-Erie enclave of federal common law, the Sabbatino Court turned to Philip Jessup's leading article.  

It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie R. Co. v. Tompkins. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were Erie extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.

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130. Id. at 339-40; see also id. at 340 ("The logic of post-Erie federal common law, even under a broad reading of Sabbatino, does not permit federal courts to do via federal common law what the political branches have clearly prohibited in their conditional assent to [human rights] treaties.").
131. See Jessup, supra note 48.
132. 376 U.S. at 425 (footnote omitted). The Court's use of the Jessup article in such a manner is significant. Jessup's article is a short two-and three-quarter pages and his argument is one precise point: "[W]hatever the specific grounds for disposing of an individual case, any attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court. Mr. Justice Brandeis
The Court’s use of Jessup provides strong evidence for the modern position.

Professors Bradley and Goldsmith acknowledge that the Supreme Court’s direct endorsement of Jessup’s article gave rise to the modern position. However, they assert that this endorsement proves little: “[O]ne can view [the Court’s endorsement of Jessup] as evidence that Sabbatino embraced the modern position only if one ignores what the Court in Sabbatino actually held and did. The Court held only that the act of state doctrine has the status of federal common law.”134 This claim is crucial for Bradley and Goldsmith since, on their reading, the Court described the act of state doctrine as a separation-of-powers issue (as opposed to an issue of international law).135 Reconciling the Court’s use of Jessup with the revisionist interpretation of the case, however, proves terribly difficult. This exceedingly narrow understanding of the Court’s holding is flawed.

First, whatever its source, the Court’s reasoning is that the act of state doctrine is federal common law because this rule is analogous to (the inarguably federal) international law. At a minimum, this is clearly the import of the Jessup quotation. The Court is aware of this claim. After discussing the potential sources of the act of state doctrine, the Court maintained that “[w]hatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature.”136 The Court considered the source of the rule analytically irrelevant to the federal common law determination.

Second, the Court also held that the scope of the act of state doctrine is governed by federal common law.137 As we describe in some detail below, the applicability of the act of state doctrine turns in part on the relevant international norm’s degree of codification. That is, settled principles of international law would presumptively not trigger the act of state doctrine. Therefore, CIL is federal law because CIL conditions the application of the doctrine.

Third, Bradley and Goldsmith oversimplify the Sabbatino Court’s analysis of the act of state doctrine’s source. As Bradley and Goldsmith correctly note, the act of state doctrine is considered “a conse-

was surely not thinking of international law when he wrote his dictum.” Jessup, supra note 48 at 743. Hence, given that the Court signed onto the article’s conclusions, it is difficult to argue that only one aspect of Jessup’s point is being supported. Jessup had only one basic point.

133. See Bradley & Goldsmith, Customary International Law, supra note 24, at 827.
135. Bradley & Goldsmith, Customary International Law, supra note 24, at 859-60; see also Weisburd, State Courts, supra note 24, at 43-44 (“The holding in Sabbatino, however, was that the act of state doctrine—a rule of domestic law—was a matter of federal law, not that customary international law was federal law.”).
136. Sabbatino, 376 U.S. at 424 (emphasis added).
137. See id. at 427 (“We conclude that the scope of the act of state doctrine must be determined according to federal law.”).
quence of domestic separation of powers.\textsuperscript{138} The revisionist interpretation of \textit{Sabbatino}, however, obscures the importance of this point. Most significantly, the Court considered international law the exclusive province of the federal government. Of course, the act of state doctrine delimits the scope of \textit{CIL actionable in federal courts}, but the contours of the domain of actionable international law is the responsibility of the federal courts.

In short, Bradley and Goldsmith tacitly reject what we consider a relatively straightforward interpretation of \textit{Sabbatino}—the act of state doctrine is justified in terms of \textit{both} separation-of-powers concerns international law: The \textit{Sabbatino} Court "conclude[d] that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application."\textsuperscript{139} Not surprisingly, the American Law Institute's \textit{Restatement (Third) of the Foreign Relations Law of the United States}, which followed soon after the decision, noted that "the holding of the \textit{Sabbatino} case that \textit{Erie v. Tompkins} does not apply to the act of state doctrine would appear to apply \textit{a fortiori} to questions of international law."\textsuperscript{140}

\begin{flushright}
139. 376 U.S. at 437 (emphasis added). \textit{Sabbatino} did not repudiate the classic understanding—from \textit{Underhill v. Hernandez}, 168 U.S. 250, 252 (1897)—that the act of state doctrine rests substantially on principles of international comity. See \textit{Sabbatino}, 376 U.S. at 416 (discussing "classic American statement of the act of state doctrine" found in \textit{Underhill}; and stating that "[n]one of this Court's subsequent cases... manifest any retreat from \textit{Underhill}"). Rather, \textit{Sabbatino} confirmed the expansion of the doctrine's focus to separation-of-powers interests, as well. See, e.g., \textit{Doe v. Unocal}, 963 F. Supp. 880, 892-95 (C.D. Cal. 1997) (discussing classic and more robust contemporary formulations of act of state doctrine). Compare Bradford Clark's discussion of the element of international law in the Court's application of the act of state doctrine:

Although the \textit{Sabbatino} Court asserted that "international law does not require application of the [act of state] doctrine," in the sense that most countries "fail to follow the rule rigidly," the Court acknowledged that the doctrine reflects "deep seated" "concepts of territorial sovereignty" shared by many nations. In other words, the act of state doctrine derives from well-established principles of the law of nations, particularly the principle that "the jurisdiction of [every] nation, within its own territory, is necessarily exclusive and absolute."

Application of these principles does not require the courts to engage in constitutionally questionable lawmaking activities, but merely to ascertain and apply a preexisting practice suggested by traditional and verifiable principles of the law of nations. In this sense, judicial application of the act of state doctrine is much like application of the rule derived from the law merchant in \textit{Swift}.

Clark, \textit{supra} note 38, at 130-01[citations omitted].
140. American Law Institute, \textit{Restatement (Second) of the Foreign Relations Law of the United States} § 3, reporters' note 2 (1965).\end{flushright}
c. Sabbatino and the Federal Common Law of Foreign Relations

Furthermore, the *Sabbatino* Court established a distinct post-Erie enclave of federal common law: “[T]he federal common law of foreign relations.”141 Bradley and Goldsmith acknowledge the “plausibility” of this view.142 Rather than deny that *Sabbatino* recognizes foreign relations issues as uniquely federal, Bradley and Goldsmith only question the expansiveness of this view. They do not refute the claim that the federal common law of foreign relations necessarily extends to customary international human rights law.

The revisionist interpretation of *Sabbatino* offers few effective avenues of criticism on this point. Bradley and Goldsmith maintain that the act of state doctrine is merely an abstention rule.143 On this reading, the *Sabbatino* Court vests all foreign affairs power in the political branches of the federal government. Of course, as we noted earlier, the Supreme Court’s holding in *Kirkpatrick* discredits this claim.144 In addition, the “sliding scale” analysis in *Sabbatino* itself demonstrates the implausibility of the revisionist interpretation. Finally, what may be called the “deference component” in the act of state doctrine should not be read too broadly: “The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law.”145 Indeed, emphasizing the deference component is in tension with the political branches’ own response to *Sabbatino*. Congress soon passed the Hickenlooper Amendment which effectively overturned the court’s decision regarding expropriations.146 The Executive Branch has also

141. This view enjoys widespread support. See, e.g., Chemerinsky, supra note 37, at 350 (“Sabbatino still stands for the important proposition that in cases related to foreign affairs, federal courts may fashion federal common law.”); Redish, Tensions, supra note 38, at 125 (arguing that Sabbatino recognized the power of the federal judiciary to create federal common law in the field of international relations).


143. See id. at 338 (“*Sabbatino* crafted the act of state doctrine to prohibit domestic application of CIL.”).

144. See supra notes 113-17 and accompanying text.


146. Section 301(d)(4) of the Public Law 88-633, 78 Stat. 1009, 1013, 22 U.S.C. § 2370(e)(2). The amendment removes the act of state doctrine—as enunciated by *Sabbatino*—as a bar on court determinations of whether a foreign government’s expropriation violates international law. The President does, however, retain the power under the amendment to compel judicial abstention in expropriation cases.

Interestingly, the Hickenlooper Amendment was applied in the *Sabbatino* case on remand. In the district court opinion, the executive branch declined to exercise its prerogative under the amendment. Banco Nacional de Cuba v. Farr, 272 F. Supp. 836, 837 (S.D.N.Y. 1965). The court, applying the Amendment, held that the Cuban government’s expropriation violated international law, thus reinstating the Court of Appeals previous holding. Id. at 838.
since supported a Court overrule of Sabbatino's deference component,\footnote{147} and federal courts have subsequently decided to read the deference component of the doctrine narrowly.\footnote{148}

Clearly, Sabbatino's articulation of the federal common law of foreign relations should extend to CIL human rights cases. Court pronouncements on the U.S. understanding of CIL necessarily affect our foreign relations, especially in cases that involve foreign nationals or foreign governments. In these matters, the constitutional underpinnings assigning appropriate spheres of competence to the different branches of government are the same structural principles involved in

\footnote{147} In Alfred Dunhill, the Court reprinted a letter from the Legal Advisor of the State Department to the Solicitor General, Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 706-711 (1990). The final paragraph of the document concludes: In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in Sabbatino so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

\footnote{148} Id. at 710-11.

Over time, the Executive Branch, as different Administrations have done, has fluctuated in its position on such matters. Cf. Bradley & Goldsmith, Customary International Law, supra note 24, at 867 n.330 (discussing various positions taken by different Administrations in Filartiga cases). In one recent case, the Administration advocated case-by-case review of act of state claims for all controversies that touch the nation's nerves. Brief for the United States as Amicus Curiae Supporting Respondent, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1989) (quoting Sabbatino, 376 U.S. at 428). The Supreme Court, however, adopted a more narrow ruling: In cases which do not reach the validity of acts of foreign governments, the doctrine does not apply. W.S. Kirkpatrick & Co., 493 U.S. at 406. As such, the Court foreclosed the Executive's attempt to adopt different positions in different circumstances, and instead adopted a broad invalidation of an aspect of Sabbatino's deference principle.

\footnote{148} See, e.g., Sharon v. Time, Inc., 599 F. Supp. 538, 553 (S.D.N.Y. 1984). The statement by the Federal District Court for the Southern District of New York is quite forceful in this regard:

Nor has the act of state doctrine received an enthusiastic response from the political branches, which are charged with regulating the jurisdiction of the federal courts. After Sabbatino, Congress limited the doctrine to prevent its application to claims for specific property located in the United States. Foreign Assistance Act of 1961, § 620(c)(2), 22 U.S.C. § 2370(c)(2) (1982). Similarly, in the Foreign Sovereign Immunities Act of 1976, § 4(a)(3), 28 U.S.C. § 1605(a)(3) (1982), Congress deprived foreign states of immunity from jurisdiction in the federal courts in regard to claims based on their alleged taking of property located in the United States in violation of international law. Our national policy reflects, if anything, a reexamination of Sabbatino, rather than a political consensus for its transformation into a jurisdictional bar through its indiscriminate amalgamation with the analogous but similarly questionable device of judicial abstention. Absent some guidance to the contrary from the political branches, the present circumstances do not justify a refusal to perform the duty to adjudicate.

\footnote{Id. (citation omitted).}
cases adjudicating actions of foreign states. Judicial interpretations of the law of nations are just that—evaluations of the validity and applicability of the collective legal practices and obligations of the community of nations. Passing on such questions triggers many of the same concerns for "national uniformity" and "uniquely federal interests" that sustained Judge Jessup and the Sabbatino Court's reasoning.

Finally, we argue that our interpretation of Sabbatino and its progeny offers strong evidence that CIL should be federal common law in many, if not all, cases involving acts of foreign governments (or actions taken under color of foreign law). At the very least, in cases that involve CIL and the acts of a foreign state, federal common law should govern. Inquiry into the status of the alleged CIL is, in fact, an elemental part of the federal "principle of decision;" \(^{149}\) the assessment of the particular CIL is counterpoised against the court's decision whether to abstain under Sabbatino's balancing approach. That is, the inquiry into the status and applicability of the CIL is itself a component of the federal common law of the act of state doctrine.

In cases that do not specifically raise an act of state inquiry, the same principles are at work. Analogous to the fact pattern in Sabbatino, international human rights cases generally evaluate the acts of foreign states and their instrumentalities. \(^{150}\) The same questions and concerns are raised in these cases as in the Sabbatino context. \(^{151}\) Indeed, the command that municipal courts "must expound, apply and develop ... [international] law whenever they are called upon to do so," \(^{152}\) is a pronouncement about common law. The post-Erie question is: Which common law? Judge Jessup's reasoning applies here:

Any question of applying international law in our courts involves the foreign relations of the United States and thus can be brought within a federal power. The application of international law by the federal courts does not need to be justified by the theory that we took over international law as part of the common law. International law is applied by the courts of many countries who look back

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149. Sabbatino, 376 U.S. at 427-28; see also W.S. Kirkpatrick & Co., 493 U.S. at 404-05 (discussing the changes that the act of state doctrine has undergone).

150. Our discussion of the structure of the modern litigation in Part II demonstrates the close connection between Sabbatino and these cases. The case law's reliance on Sabbatino for the decision's pronouncement of federal common law of foreign relations and for its specific limiting principle is strong evidence of the directly analogous, if not common, concerns.

151. Cf. Brief for the United States as Amicus Curiae Supporting Respondent, W.S. Kirkpatrick & Co., 493 U.S. at 400 ("Even private litigation challenging the sovereign act of a foreign state affects the foreign relations interests of the United States, the other country involved, and the community of nations matters for which the President and Congress are responsible under the Constitution.").

152. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 861 (2d Cir. 1962) (citation omitted); see also id. at 860 ("In the absence of any relevant treaty, enactment of the legislature, act of the executive, or controlling judicial decision, we have been told to draw the guiding concepts of international law from the customs and usages of civilized nations.").
upon no inheritance from England . . . . The duty to apply [international law] is one imposed upon the United States as an international person. The several states of the Union are entities unknown to international law. It would be unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.\footnote{153}

The clear implication of Judge Jessup’s reasoning is that CIL is federal common law.

All cases that determine whether a foreign state or its instrumentality has violated CIL fit this category; there are, after all, only a “handful of crimes to which the law of nations attributes individual responsibility.”\footnote{154} Furthermore, such cases necessarily involve courts passing on the validity of the foreign government’s act. Accordingly, these judicial inquiries satisfy the Court’s \textit{Kirkpatrick} test.\footnote{155} The doctrine may also reach cases in which nominally private entities are deemed state actors either under a conventional state action test\footnote{156} or according to definitions of a state under international law.\footnote{157}

In practice, the federal common law of CIL has been limited to a small set of universally recognized human rights norms. In the ongoing ATCA litigation, federal courts have defined, meticulously observed, and rigorously applied this “federal common law of universal human rights.” The \textit{Sabbatino} framework has figured directly in a number of ATCA decisions.\footnote{158} As we detail below, the current litigation is structured against the backdrop of \textit{Sabbatino}’s sliding-scale. In the following section, we document the federal courts’ rigorous application of \textit{Sabbatino}’s dynamic framework to ATCA claims. These cases demonstrate the built-in restraints of the federal common law of CIL; they also disprove the revisionist interpretation of the \textit{Sabbatino} decision.\footnote{159}

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\begin{enumerate}
\item[153.] Jessup, \textit{supra} note 48, at 743.
\item[154.] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring); \textit{see infra} discussion at Part II.C.1.
\item[155.] \textit{See infra} discussion at Part II.C.1.
\item[157.] Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995) (discussing and applying functional definition of state under international law); \textit{id.} at 245 (applying standards for action taken under color of law).
\item[158.] \textit{See}, \textit{e.g.}, Tel-Oren, 726 F.2d at 790 (Edwards, J., concurring); \textit{id.} at 802 (Bork, J., concurring); \textit{Filartiga}, 630 F.2d at 881; Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp 246, 258 (D.D.C. 1985); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982); \textit{see also} text accompanying notes 176-224 (cases using the \textit{Sabbatino} framework).
\item[159.] Notably, \textit{Sabbatino}’s dynamic framework has found similar expression in act of state cases. In several decisions, courts have found that universal and well-defined CIL satisfies the sliding-scale. As such, these cases demonstrate that \textit{Sabbatino} does not stand for an inflexible federal common law of judicial restraint, but has often been invoked to support judicial determination of CIL claims. \textit{See}, \textit{e.g.}, Liu v. The Republic of China, 892 F.2d 1419 (9th Cir. 1989) (holding that the acts of state doctrine did not bar wrongful death action against the Republic of China for the government-sponsored murder of a man in California); \textit{id.} at 1433 (noting that a “factor to be
B. Standards for Actionable CIL

The ATCA case law has been shaped by Sabbatino’s pronouncements on the federal common law of foreign relations. Applying the sliding-scale, the Sabbatino Court explained that in evaluating expropriation claims: “It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.”160 In accordance with the sliding-scale framework, however, the Court explained that courts should not retreat from adjudicating claims grounded in universal international law, stating

“[t]here are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.”161 The Second Circuit expressed this in Filartiga:

The case at bar presents us with a situation diametrically opposed to the conflicted state of law that confronted the Sabbatino Court. Indeed, to paraphrase that Court’s statement, there are few, if any,

considered is the degree of international consensus regarding an activity” and quoting Sabbatino sliding-scale); De Arellano v. Weinberger, 745 F.2d 1500, 1540 (D.C. Cir. 1984) (“In Sabbatino the Court was careful to distinguish between judicial adjudication of the validity of a foreign act when there are no standards for adjudication from those cases in which United States treaties or international law provide specific guidance to the Judiciary in a particular area of foreign relations.”); id. (explaining Sabbatino restraint component is not advisable “when there are generally accepted tenets of international law concerning the foreign act”); see also Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 704 (1976) (applying rules of international law when they are clearly discernible). In the Filartiga litigation, the district court, on remand of the case, addressed the act of state doctrine’s application to the case. Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984). The court applied Sabbatino’s sliding scale, holding that jurisdiction was appropriate:

[T]he Court of Appeals held that the alleged acts constitute, by the ‘general assent of civilized nations,’ a ‘clear and unambiguous’ violation of the law of nations. As the Supreme Court noted in discussing the act of state doctrine in the Sabbatino decision, ‘the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it."

Id. at 862 (citation omitted); see also Kadic, 70 F.3d at 250-51 (applying Sabbatino sliding scale to grant jurisdiction over CIL claims of genocide and war crimes). “[Sabbatino] was careful to recognize the doctrine ‘in the absence of . . . unambiguous agreement regarding controlling legal principles,’ such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien’s property—in which world opinion was sharply divided.” Id. (omission in original)

(citations omitted).

161. Id. at 430 n.34; see also id. at 467 n.26 (White, J., dissenting) (“[S]ubsequent cases not involving expropriations will require us to determine if the act of state doctrine applies and the Court’s standard is the strength and clarity of the principles of international law thought to govern the issue.”).
issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody.\textsuperscript{162}

Accordingly, the \textit{Filartiga} court’s holding that official torture is justiciable followed \textit{Sabbatino}’s controlling mandate for federal common law.

The \textit{Sabbatino} Court’s sliding-scale has received expression through a three-part limiting principle: Federal courts have adopted a relatively stringent tripartite test for assessing whether an alleged act constitutes an \textit{actionable} CIL claim. As the doctrine’s progenitor, \textit{Filartiga} is often cited for the proposition that, under § 1350, judicially cognizable CIL must be (1) universal; (2) definable; and (3) obligatory.\textsuperscript{163} This tripartite test effectively limits the range of actionable claims to a privileged subset of CIL—\textit{jus cogens} (or “compelling law”) violations. That is, successful ATCA plaintiffs, as a practical matter, must raise claims based on \textit{jus cogens} norms\textsuperscript{164}—a short list of settled, peremptory norms which sit at the highest echelon of international law.\textsuperscript{165}

\textsuperscript{162} \textit{Filartiga}, 630 F.2d at 881 (citing \textit{Sabbatino}, 376 U.S. at 428). But cf. Bradley & Goldsmith, \textit{Customary International Law}, supra note 24, at 834 (stating that the \textit{Filartiga} court “made no attempt to fit CIL within the rationale of \textit{Sabbatino}”).

\textsuperscript{163} See, e.g., \textit{In re Estate of Ferdinand Marcos}, Human Rights Litig., 25 F.3d 1467, 1475-76 (9th Cir. 1994) (“We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . .” (citing \textit{Filartiga}, 630 F.2d at 885-87)); \textit{Xuncax} v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995); \textit{Forti v. Suarez-Mason I}, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (“The contours of this requirement have been delineated by the \textit{Filartiga} court and by Judge Edwards in \textit{Tel-Oren} . . . . This ‘international tort’ must be one which is definable, obligatory (rather then hortatory), and universally condemned.” (citing \textit{Filartiga}, 630 F.2d at 881) (other citations omitted).


\textsuperscript{165} Indeed, courts’ explanation of the controlling test for actionable CIL frequently approximates the language used to describe a \textit{jus cogens} violation. For instance, the U.S. District Court for the District of Massachusetts, relying on both \textit{Filartiga}, 630 F.2d at 884, and \textit{Forti I}, 672 F. Supp at 1539-40, defined the third component of the test in terminology which tracks \textit{jus cogens} language: “[T]he prohibition against [the action] is non-derogable and therefore binding at all times upon all actors.” \textit{Xuncax}, 886 F. Supp. at 184; see also \textit{In re Estate of Ferdinand E. Marcos}, Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) (finding a suit of wrongful
Accordingly, the three components of the ATCA’s “jus cogens test” are designed to ensure that a circumscribed but fundamentally important set of legal claims succeeds. The First, Second, and Ninth Circuits have done most of the work in elaborating the meaning and purposes of the three limiting standards. The Court of Appeals for the Second Circuit, for example, explained that the test’s standard of universality, in combination with the component of obligation, purposefully establishes a relatively stringent criteria. The rationale undergirding such requirements is based primarily on the principle of consent—namely, the courts of United States should not sit in judgment of the valid acts of another state in the absence of agreement on the controlling principles of law. As such, these standards coincide with the Sabbatino Court’s concern for finding a consensus in order for courts to “focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.”

The third component—definability—narrows the potential claims to those that are clearly appropriate for judicial determination. That

death “by official torture in violation of jus cogens norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350”; Siderman de Blake, 963 F.2d at 717 (“In Filartiga, though the court was not explicitly considering jus cogens, Judge Kaufman’s survey of the universal condemnation of torture provides much support for the view that torture violates jus cogens.”); Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997) (“Under the ATCA, jurisdiction may be based on a violation ‘of a jus cogens [sic] norm which enjoys the highest status within international law.’” (citations omitted)). To be sure, certain advocates have suggested possibilities of further expansion of § 1350 claims which would arguably dispense with the jus cogens limitation. See Steinhardt, supra note 55, at 81 (suggesting prospective ATCA suits from future solidification of norms against free speech restrictions and race and gender discrimination). According to the settled case law, however, such developments would ultimately still have to meet all of the tripartite burdens.

166. Throughout this Article, we refer to the tripartite test interchangeably as the ATCA’s “jus cogens test.” Admittedly, courts do not explicitly recognize that they seek to limit actionable CIL claims to jus cogens violations. However, such a limitation is the practical effect of the tripartite test’s decision-making criteria. Consequently, the terminology we adopt has significant descriptive power in getting to the heart of the ongoing litigation.

168. See, e.g., Filartiga, 630 F.2d at 876.
169. See, e.g., In re Estate of Ferdinand Marcos, 25 F.3d at 1475; Forti, 672 F. Supp. at 1531.
170. See Filartiga, 630 F.2d at 881 (“The requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one.”).
171. The Filartiga court followed its evaluation of the stringency of the standard with a recognition of its normative logic: “Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.” Id; see also Forti, 672 F. Supp. at 1540 (“The requirement of international consensus is of paramount importance, for it is that consensus which evinces the willingness of nations to be bound by the particular legal principle, and so can justify the court’s exercise of jurisdiction over the international tort claim.”).
is, the test’s requirement of definability, or specificity, demands that clear parameters determine the norm’s content. In accordance with the Sabbatino sliding-scale, a proposed norm must have sharply specified, universally agreed-upon boundaries to be actionable in U.S. courts.

In short, the status of jus cogens carries such significant legal weight that courts have closely guarded against unwarranted expansion. The range of potential jus cogens violations are, of course, not a closed set. Other norms may yet ripen into the same state of universal acceptance, definability, and obligation. Nevertheless, federal courts have been fairly strict in determining whether an alleged offense constitutes such a violation. The results of ATCA cases demonstrate the importance of these restraining principles. In furtherance of this point, the following section outlines the composition of the present case law by identifying the types of claims that have satisfied—or failed to satisfy—the courts’ tripartite standard.

C. The Content of CIL under § 1350 Litigation

Federal courts require ATCA plaintiffs to allege, at minimum, violations of universally recognized human rights. The following discussion presents a representative sample of the nature of these suits. In this section, we detail the types of claims that succeed under § 1350. As with legal standards in general, the ATCA ‘jus cogens test,’ contains a set of claims which clearly meet its standards, a set that clearly fail, and a set that falls in the gray area between the two.

Before analyzing the contemporary litigation, we should make one point clear: Our catalogue of the ATCA case law can provide only a snapshot of the present state of actionable CIL. While the tripartite test remains static, certain CIL norms may still emerge into the position of jus cogens. As such, ATCA jurisprudence includes a dynamic element that the following discussion is not meant to obscure. Perhaps this element partially explains the “gray area” between crystallized and emergent universal CIL. Regardless, the structure of the litigation still reveals that the federal judiciary’s rigorous application of the tripartite rule successfully polices the border such that only incontrovertible jus cogens claims are found actionable under the ATCA.

173. In re Estate of Ferdinand Marcos, 25 F.3d at 1475.
175. Xuncax v. Gramajo, 886 F. Supp. 162, 189 (D. Mass. 1995) (“[C]autious is required in identifying new violations of jus cogens.”); Forti, 672 F. Supp. at 1542-43 (“Before this Court may adjudicate a court claim under § 1350, it must be satisfied that the legal standard it is to apply is one with universal acceptance and definition; on no other bases may the Court exercise jurisdiction over a claimed violation of the law of nations.”).
1. Easy Cases Part I: Incontrovertible \textit{Jus Cogens} Violations

While the full range of customary international human rights law may be subject to considerable debate, a subcategory comprising \textit{jus \textit{cogens}} prohibitions has been settled beyond question. The incontrovertible nature of these proscriptions have received uniform recognition by the federal courts in § 1350 litigation. Indeed, these cases often introduce into federal courtrooms the most shockingly severe human rights atrocities one might imagine. The \textit{Filartiga} district court conveyed the nature of the horror: “Spread upon the records of this court is the evidence of wounds and of fractures, of burning and beating and of electric shock, of stabbing and whipping and of mutilation, and finally, perhaps mercifully, of death, in short, of the ultimate in human cruelty and brutality.”\footnote{176} 

The factual record in \textit{Filartiga} typifies the broader population of successful ATCA cases. The court’s resulting legal conclusions are representative of that larger body of case law as well. Faced with such gross deprivations of what every nation in the world considers to be fundamental human rights, courts have permitted jurisdiction for claims of torture, extrajudicial killings, prolonged arbitrary detention, genocide, disappearance, and ancient law of nations violations. This subsection tracks the case law’s acceptance of these legal claims, relates some of the more pertinent factual records, and identifies the materials used by judges in considering the status of the norm involved.

\subsection*{a. Official Torture}

The firm basis of the \textit{Filartiga} decision was built, in part, on the solidity of the plaintiffs’ particular international human rights claim. Surviving family members of seventeen-year old Joel Filartiga sued a Paraguayan Inspector General of Police for kidnapping and torturing Joel to death.\footnote{177} Official torture, the Second Circuit held, constituted an unambiguous violation of the law of nations.\footnote{178} While \textit{Filartiga} may be noted for the strength of the underlying human rights claim, it is no exception in this regard. Plaintiffs in other § 1350 cases have filed suit for similar instances of extreme brutality at the hands of offi-

\footnote{177. \textit{Id.} at 861.}
\footnote{178. \textit{Filartiga} v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody.").}
1997] HUMAN RIGHTS STANDARDS & U.S. LAW 499

cials.179 Similarly, strong judicial pronouncements concerning the
legal status of the prohibition of official torture have followed.180

Notably, the Filariga court’s method of analyzing the international
law claims has also become the routine judicial method. The Second
Circuit’s conclusions rested on its assessment of “the universal con-
demnation of torture in numerous international agreements, and the

cited treatment that he suffered during more than a year’s imprisonment at a security
camp. There, under the direction of the defendant, “security officers beat him and
administered electric shocks to his body, particularly to his genitals, sometimes as
often as three times a night.” 921 F. Supp. at 1191 (citation omitted); see also Abebe-
Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (security chief personally supervised and
directly participated in torture of female plaintiffs, including ordering each woman to
be stripped naked, bound by her hands and feet, hung from a pole, beaten severely,
and vomit-soaked cloth stuffed in her mouth to suppress screams, and water
poured over her wounds to increase pain); In re Estate of Ferdinand Marcos, Human
Rights Litig., 25 F.3d 1467, 1472 (9th Cir. 1996) (personal interrogation by Ferdinand
Marcos; water torture; seven months in hot, unlit cell; five years in solitary confine-
ment, shackled and severely beaten); In re Estate of Ferdinand E. Marcos, Human
Rights Litig., 978 F.2d 493, 495-96 (9th Cir. 1992) (kidnapping, interrogation, and tor-
turing to death of politically outspoken individual). In a recent 11th Circuit district-
level decision, Paul v. Avril, the following acts were left undisputed by the defendant
Haitian Lieutenant General Prosper Avril:

These include acts such as severe beatings, being dragged up flights of stairs,
having lit cigarettes inserted in the nostrils, being put in contortionist posi-
tions while beaten with particular attention being paid to the skull and groin,
refusal to administer medical treatment, being paraded on national tele-
vision and falsely accused of being involved in an assassination plot, deliberate
starvation and other equally indescribable acts of unmerciful treatment.


In Avril, however, the plaintiff sued under multiple claims, including torture; cruel,
inhuman, and degrading treatment; arbitrary arrest and detention without trial. Id. at
209. Since those claims were left undisputed, one might semantically question which
of the abuses would have fit directly under the rubric of “torture.” We give brief
treatment to such considerations below. See infra text accompanying notes 180-88.

Here, however, the point is to reveal the facts that drive these cases; which, in turn,
helps to explain how such indisputable illegalities inform courts’ recognition that a
CIL violation has taken place. These hard-hitting facts expose the grave abuses that the
limited canon of jus cogens norms tries to arrest. They also demonstrate why no
country asserts the legal right to engage in such acts. Cabiri, 921 F. Supp. at 1198
(explaining “[the defendant] does not claim that the acts of torture he is alleged to
have committed fall within the scope of his authority. He does not argue that such
acts are not prohibited by the laws of Ghana; nor could he . . . . [N]o government
asserts a right to torture its citizens . . . .” (citing Filariga, 630 F.2d at 884)). Most
importantly, the graphic nature of the factual records sheds a critical light on the
revisionists’ contention that contemporary CIL is overly malleable. See Bradley &
Goldsmith, Customary International Law, supra note 24, at 838-42; Bradley & Gold-

180. See In re Estate of Ferdinand E. Marcos, 978 F.2d at 499 (explaining that it is
“unthinkable” to hold that official torture does not violate customary international
law) (citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir.
1992)); Cabiri, 921 F. Supp. at 1196 (alleged acts of the defendant violated “a funda-
mental principle of the law of nations: the human right to be free from torture”);
Forti, 672 F. Supp. at 1541 (expressing “no doubt” that official torture is cognizable
§ 1350 violation of law of nations).
renunciation of torture as an instrument of official policy by virtually all of the nations of the world . . . ."181 The court specifically referenced the United Nations Charter,182 the Universal Declaration of Human Rights,183 and the U.N. General Assembly’s unanimous Declaration on the Protection of All Persons from Being Subjected to Torture.184 Considered together, these instruments helped prove the universality, definability, and obligation of the norm.185 To substantiate its finding, the court also relied on several sources of U.S. political branch action, including: the Department of State’s human rights reports,186 congressional statutes,187 and, perhaps most importantly, the amicus brief filed on behalf of the United States.188 As the following cases demonstrate, Filartiga’s investigation of such international and domestic legal instruments typifies the ways in which other CIL claims are deemed actionable in federal court.189

181. Filartiga, 630 F.2d at 880.
182. Id. at 881-82 (explaining while “precise extent” of fundamental freedoms under the Charter are disputable, “there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture”); U.N. Charter art. 55.
185. The court did not find that any of these instruments, alone, established the binding principle against torture, but rather each was taken as “evidence of” the norm. Filartiga, 630 F.2d at 880 n.7; id. at 882 n.9.
186. Id. at 884 (quoting Dept. of State, Country Reports on Human Rights for 1979, in House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. (Joint Comm. Print 1980)).
187. Filartiga, 630 F.2d at 884-85 n.17 (citing 22 U.S.C. § 2304(a)(2) and 22 U.S.C. § 2151(a)). These statutes were cited more for the proposition that international law establishes personal fundamental rights, not for the proposition regarding torture specifically.
188. Filartiga, 630 F.2d at 884; cf. In re Estate of Ferdinand E. Marcos, Human Rights Litig., 978 F.2d 493, 499-500 (dismissing defendant’s claim that intervening acts of legislative and executive branches since Filartiga should forestall this holding).
189. Notably, the reasoning in Filartiga may also be contrasted with other cases in which a proposed CIL norm fails the test, such as the prohibition of nonofficial torture. In particular, contrasting the Filartiga opinion with Judge Edward’s discussion of nonofficial torture in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring), demonstrates both the importance of the tripartite test as well as the influence of Sabbatino in such evaluations. Invoking Sabbatino’s sliding scale, Judge Edwards found the requisite degree of universal consensus lacking:

[H]eeding the warning of the Supreme Court in Sabbatino, to wit, “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.” I am not prepared to extend the definition of the “law of nations” absent direction from the Supreme Court. The degree of “codification or consensus” is simply too slight.

Id. at 792 (citing Sabbatino, 376 U.S. at 428).
According to settled law, extrajudicial killings also constitute a judicially cognizable violation of CIL. The most comprehensive articulation of this norm's legal status is found in Forti v. Suarez-Mason I. The Forti I court was faced with a gruesome account of abduction, torture, prolonged arbitrary detention, disappearance, and extrajudicial killing. In sorting through each of the legal claims, the court applied the tripartite test for actionable CIL. The court concluded that state-sponsored "murder and summary execution" are prohibited under an international legal norm that is "universal, is readily definable, and is of course obligatory." This assessment was not contro-

By "too slight" Judge Edwards meant that a couple of international documents suggested the international law of nonofficial torture had not reached a state of universal agreement. Id. at 795 (discussing Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. ESCOR, 3rd Sess., 5th mtg., U.N. Doc. E/CN.4/L.1576 (1981); and Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34 at 91-92, U.N. Doc. A/10034 (1975)). Accordingly, Judge Edwards' opinion exemplifies the type of judicial reasoning that is generally overlooked in the revisionist account. That is, courts confronted with some counter-vailing evidence may hold that such claims lack the requisite degree of consensus. The revisionists mischaracterize the prevailing judicial approach. They suggest that judges adopt the reverse presumption, finding actionable CIL violations when presented with even minimal international documentation. See Bradley & Goldsmith, Customary International Law, supra note 24, at 838-42; Weisburd, State Courts, supra note 24, at 9-11. Their account, however, fails to explain courts' general unwillingness to find a new CIL claim. Moderate contrary indications can have a decisive impact on any of the three parts of the "jus cogens test," especially for the showing of universality. See also Xuncax v. Gramajo, 886 F. Supp. 162, 189 (D. Mass. 1995) ("While it is true that blind adherence to formal labels should be avoided, caution is required in identifying new violations of jus cogens. Thus, despite the compelling character of plaintiffs' claims, I am reluctant to stretch the category of 'cruel, inhuman or degrading treatment' to encompass constructive expulsion." (citation omitted, parenthetical quote omitted)).


191. The plaintiffs, a sixteen-year-old woman and her seventeen-year old brother, were abducted from their bedroom by ununiformed military personnel. The young woman was, first, held blindfolded and handcuffed for a week without food or clothing, and, subsequently, imprisoned without charge for more than four years. Id. at 1537. Her brother's body was returned to the family by the military personnel the day after the their initial abduction. He had died of internal bleeding from bullet wounds; his face severely disfigured from physical beatings. See id. Family members brought suit under § 1350 on the basis of a number of CIL violations. The family sued for the brother's death under the claim that a killing by state officials without any court procedure or other due process of law constituted a summary execution in violation of the law of nations. See id. at 1537-38.

192. Id. at 1542.
versial. Rather, the Forti I court was able to rely on unambiguously supportive opinions from other circuits in rendering its judgment.

c. Prolonged Arbitrary Detention

In Forti I, the federal district court also concluded that a nation’s prolonged arbitrary detention of its citizens violates CIL. Such a norm, in the court’s assessment, has “sufficient consensus” and is “obligatory, and is readily definable.” The court, first, distinguished prolonged detention of uninvited aliens, which other cases have concluded does not violate CIL. In finding an actionable CIL norm against prolonged arbitrary detention of a nation’s own citizens, the court relied on Rodriguez-Fernandez v. Wilkinson’s wide-ranging analysis of the relevant international treaties, cases, and commentaries. In confirmation of the Forti I court’s reasoning, the Ninth Circuit Court of Appeals has since agreed that prolonged arbitrary detention constitutes an unequivocal law of nations violation.

d. Genocide

The prohibition against genocide represents another “easy case” in ATCA litigation. In the leading case on the issue, Kadic v. Karadzic, the Court of Appeals for the Second Circuit only had to assess the defendant’s argument that the universal prohibition against genocide

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193. *Xuncax*, 886 F. Supp at 185. The court explained that:

> [T]he practice of summary execution . . . [has] been met with universal condemnation and opprobrium . . . . An affidavit signed by twenty-seven widely respected scholars of international law attests that every instrument or agreement that has attempted to define the scope of international human rights has 'recognized a right to life coupled with a right to due process to protect that right.' And again, not only are the proscriptions of these acts universal and obligatory, they are adequately defined to encompass the instant allegations.

*Id.* (citations omitted).

194. *Forti*, 672 F. Supp. at 1539 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)); *id.* at 1542 (“[T]he right not to be murdered [by the state] is among the 'basic rights' which 'have been put generally accepted—and hence incorporated into the law of nations.'” (quoting De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985))).

195. *Id.* at 1541-42.

196. *Id.*

197. *Id.* at 1541.


199. Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996). The factual record of these cases clearly fit within the definition of prolonged arbitrary detention and probably help drive the norm’s acceptance. See, e.g., *id.* at 795 (holding that one plaintiff’s seven years of solitary confinement “clearly meet the definition of prolonged arbitrary detention”; and other plaintiff’s more than four years of house arrest without charge “clearly come within the definition of prolonged arbitrary detention”).
did not apply to private actors.200 The court held that the CIL prohibition against genocide applied to state actors and nonstate actors, alike.201

Chief Judge Newman, writing for the court, referenced executive branch statements, congressional enactments and international instruments, all of which pointed to the same conclusion. The court relied on the Executive Branch's submitted statement in the case as well as historical material reflecting earlier executive positions.202 Indeed, the Department of Justice's brief outlined a clear position against the defendant.203 Chief Judge Newman, in further discussing the specific prohibition of genocide, based his analysis on three pillars of international law—the unanimous 1946 General Assembly Resolution defining and condemning acts of genocide,204 the Charter of the Nuremberg Tribunal,205 and the Genocide Convention itself.206 Each of these documents included the United States as a signatory state, and each confirmed that the prohibition against genocide encompassed private actors.207 Consequently, the court concluded that the

201. Id. at 242. The court's holding has been followed in Beanal v. Freeport-McMoran, 969 F. Supp. 362 (E.D. La. 1997), and Mushikibabo v. Barayagwiza, No. 94 Civ. 3627, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996) (torture and summary execution as part of coordinated genocide effort by nonstate actors constituted actionable CIL claim). In Beanal, however, the district court gave the plaintiff leave to amend his complaint. 969 F. Supp. at 384. The plaintiff had alleged that the defendant was destroying the Amungme culture. The court explained that genocide, as universally defined, only applies to destruction of groups and their members (e.g., the Amungme people), not the group's culture. Id. at 372-73.
203. The Department of Justice did not equivocate:
   Article 4 of the Genocide Convention . . . [includes] 'persons committing genocide whether they are constitutionally responsible rulers, public officials, or private individuals.' And . . . the various Geneva Conventions of 1949 . . . apply to all parties to an armed conflict, whether or not they are states. These conventions are thus reflective of customary international law.'

Statement of Interest of the United States at 10, Kadid, 70 F.3d at 232; see also id. at 5 ("[The district] court concluded that 'acts committed by non-state actors do not violate the law of nations.' The district court's conclusion is incorrect. Customary international law does not bind exclusively state actors. Depending upon the violation alleged, acts committed by non-state actors may indeed violate international law." (citation omitted)).
207. Kadid, F.3d at 240-42. Notably, issues concerning non-self-executing treaties (e.g., the Genocide Convention) involve a significant point of disagreement between
plaintiffs' claims that Radovan Karadzic personally planned and order the murder, rape, and forced impregnation of Bosnian Muslims and Bosnian Croats "clearly state[d]" a violation that fit within the scope of the CIL concerning genocide.

e. Disappearances

Disappearances constitute another well settled CIL claim under § 1350. Forti II contains the most comprehensive treatment of the norm's status. The decision primarily involved determining whether an international consensus existed on the norm's definition. The court relied on several international legal sources in finding that

the revisionist position and modern position. The revisionists criticize the incorporation of such non self-executing treaties into domestic law. See Bradley & Goldsmith, Customary International Law, supra note 24, at 858-59; Trimble supra note 24, at 727-29.

The Kadic court provided one answer to this concern: Congress's decision not to provide a private remedy under the Genocide Convention decidedly left other non-conflicting statutes untouched; and "the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act." 70 F.3d at 242; see also Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996) ("[T]he 'committed in violation' language of the statute suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the Alien Tort Claims Act." (citations omitted)).

Furthermore, certain provisions of a treaty may contain expressions of CIL even in the absence of U.S. ratification of the entire treaty. Rosalyn Higgins, Problems and Process: International Law and How We Use It 28-29 (1994). Professor Higgins writes:

[W]hile not being bound by all but the particular provisions of the Genocide Convention, no non-ratifying state could claim to be free to commit genocide because it was not a party to that legal instrument. The prohibition against genocide clearly pre-existed the Convention as a prohibition of customary international law.


208. Kadic, 70 F.3d at 242.

209. Admittedly, classifying disappearances within the category of incontestible claims requires some qualification since the first ATCA court to decide the issue—the district court in Forti I—required an amended complaint and rehearing of the issue before accepting the norm's status as CIL. However, the court's decision to request a further submission of arguments was due to the plaintiff's original failure to provide comprehensive evidence. Forti I, 672 F. Supp. at 1542-43. The court thus required further briefing to decide specifically whether the prohibition against disappearances included a universally-accepted definition of the norm. The court's subsequent decision, thus, represents the leading case in the area and has since been embraced with congressional approval and has been relied upon as persuasive precedence in the Second Circuit. See infra text accompanying note 261 (outlining approval of Forti II's holding in legislative history of the TVPA); Xuncax v. Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995).

disappearances constitute "a universally recognized wrong under the law of nations."211 These authorities included a prominent General Assembly Resolution,212 the Universal Declaration of Human Rights,213 the International Covenant on Civil and Political Rights,214 and a resolution of the Organization of American States.215 Other documents included congressional statutory provisions that support this consensus view.216 In sum, the court agreed that a universal and obligatory prohibition exists against disappearances, thus resolving two of the three prongs of the tripartite test.217 In sorting through the legal instruments and submissions by numerous experts, the Ninth Circuit recognized—in the words of Professor Thomas Franck—"[t]he international community has also reached a consensus on the definition of a 'disappearance.' It has two essential elements: (a) abduction by a state official or by persons acting under state approval or authority; and (b) refusal by the state to acknowledge the abduction and detention."218

f. Ancient Law of Nations Violations

Centuries-old CIL norms can establish a cause of action under the ATCA. Judge Bork's Tel-Oren opinion acknowledged that universal CIL norms with this ancient pedigree may properly fall within the scope of the ATCA.219 In fact, Judge Bork took special care to note several points of agreement between himself and the Filartiga court.220 Judge Bork, however, applied an originalist interpretation to the law of nations, effectively freezing the range of causes of action to ones settled hundreds of years ago. Accordingly, in the wake of Tel-Oren, the D.C. Circuit still permits ATCA suits to proceed if such a claim is

211. Id. at 710.


215. Id. ("The Organization of American States has also denounced 'disappearance' as 'an affront to the conscience of the hemisphere and . . . a crime against humanity.'" (citing Organization of American States, Inter-American Commission on Human Rights, G.A. Res. 666 (XIII-0/83), O.A.S. GAOR, 7th Sess., O.A.S. Doc. OEA/Se.L/VII/63 doc. 10 (Sept. 24, 1984) (on file with the Fordham Law Review)).

216. Id. (relying on 22 U.S.C. § 2304(d)(1)).

217. Id. at 711-12.

218. Id. at 710 (quoting Thomas Franck).


220. Id. at 819-20. Judge Bork's agreement with Filartiga notably included recognition that the prohibition of official torture constituted an "international law rule . . . about which there is universal agreement 'in the modern usage of nations.'" id., and that international law is federal common law. Id. at 810.
at issue. Specifically, in a post-*Tel Oren* D.C. district court case the plaintiffs succeeded in their claim that the unlawful seizure, 35-year detention, and possible death of a diplomat violated centuries-old law of nations obligations establishing diplomatic immunity.

Similar claims have succeeded in other circuits, including a notable predecessor of *Filartiga*. In the 1961 case *Adra v. Clift*, the federal district court held that the defendants' actions—falsifying passports in the process of kidnapping and internationally transporting a child across international borders—constituted a violation of long-vested law of nations principles. More recently, a Ninth Circuit district court decision held that a private actor's involvement in slave trade—a CIL violation since the time of Blackstone—constituted an actionable § 1350 violation. These types of ATCA claims remain an undisputed and relatively uncomplicated area of the present litigation.

2. Hard Cases: Controvertible *Jus Cogens* Violations

The prohibition of cruel, inhuman, or degrading treatment is the only international legal principle that we classify within the gray area of actionable CIL; it is the only claim over which the federal courts disagree. The norm, broadly speaking, satisfies the requirements of

221. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 257 (D.D.C. 1985) ("It is clear that even under the narrowest of these standards proposed in *Tel-Oren*, or adopted in other forums—§ 1350 provides this Court with subject matter jurisdiction to determine the liability for the injury that has resulted from the violation of . . . diplomatic immunity.").

222. Id. at 257 (“An accredited diplomat has been detained and held incommunicado for more than 35 years; his whereabouts have been concealed; and the defendant may have caused his death. *There can be no clearer violation of the law of nations.*” (emphasis added)); see also id. at 256 (explaining case as involving violations “of treaties codifying the fundamental principle of diplomatic immunity, which has been universally recognized as binding since before the times of Blackstone and de Vattel.”). The *Von Dardel* decision also discusses *Sabatinio*’s sliding-scale and explains that the law of nations violations at hand “are so well established that judicial determination . . . poses little or no threat to the doctrine of separation of powers.” *Id.* at 258.


224. Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995) (“The inclusion of piracy and slave trade from an earlier era . . . demonstrates that the offenses of ‘universal concern’ include those capable of being committed by non-state actors.”); id. at 239 (“An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy . . . . Later examples are prohibitions against the slave trade and certain war crimes.” (citations omitted)); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring) (“One strand of individual liability apparently survived the 19th century swing toward statism—private responsibility for piracy. It remained, with only a handful of other private acts, such as slave trading, as a conutation of the general principle of statism.”).

225. This statement requires a caveat: The First Circuit district court decision which upheld a § 1350 claim under cruel, inhuman, or degrading treatment partly distinguished the Ninth Circuit district court’s contrary ruling due to congressional ratifi-
universal condemnation and obligatory prohibition. Yet, questions regarding the definitional boundaries of the norm have limited its application. While nations may agree that certain grotesque practices fall within the category, they are unable to agree, with the requisite precision, on the definitional parameters of the norm involved.

Due to the problem of the norm's definability, a federal court refused to accept such complaints altogether.226 In Forti I, the U.S. District Court for the Northern District of California initially rejected a claim of cruel, inhuman, or degrading treatment, but subsequently allowed the plaintiffs to amend their complaint and provide better evidence supporting the definability of the norm.227 On rehearing, the plaintiffs in Forti II constructed an argument that cruel, inhuman, or degrading treatment exists on a continuum of suffering with torture at its extreme end.228 That is, the plaintiffs developed criteria for systematically defining cruel, inhuman, and degrading treatment. Such creative lawyering is in tension with the underlying logic of § 1350 doctrine—that the criteria defining the content of the norm in question must be universal and well-established. The district court accordingly rejected the plaintiffs' argument, holding that cruel, inhuman, or degrading treatment is not actionable under § 1350 without "consensus in the international community as to the tort's content."229

In Xuncax v. Gramajo, the U.S. District Court for the District of Massachusetts considered,230 but ultimately rejected231 the analysis of

citation of international treaties, which had occurred in the interim. See infra text accompanying notes 230-31. Furthermore, the Court of Appeals for the Ninth Circuit has subsequently expressed a view of the underlying norm which is in tension with its lower federal court's judgment. See Hila'o v. Estate of Marcos, 103 F.3d 789, 794-95 (9th Cir. 1996).

227. Id. at 1543 ("Because this right lacks readily ascertainable parameters, it is unclear what behavior falls within the proscription . . . . Lacking the requisite elements of universality and definability, this proposed tort cannot qualify as a violation of the law of nations.").
229. See id. at 712 ("To be actionable under the Alien Tort Statute the proposed tort must be characterized by universal consensus in the international community as to its binding status and its content." (emphasis in original)). Recently, the Court of Appeals for the Ninth Circuit managed to sidestep the question of the norm's definability by concluding that the plaintiffs' claims were already covered by torture and prolonged arbitrary detention. Hila'o, 103 F.3d at 795. The Hila'o court, nonetheless, provided serviceable dicta supporting the norm's status as CIL, persuasive commentary which may help substantiate the continuum theory proposed by the plaintiffs in Forti II. Id. at 795 ("[T]he international conventions or declarations banning such treatment indicate that 'torture constitutes an aggravated and deliberate form of cruel inhuman or degrading treatment or punishment.'" (quoting Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 34/52, U.N. GAOR, 30th Sess., Supp. No. 34, at art. 1(2), U.N. Doc. A/10034 (1975)).
231. Id. at 187.
Forti II. The district court accepted the plaintiffs' argument that, subsequent to Forti II, the Senate ratification of, and specific reservations to, both the Convention Against Torture and the ICCPR gave content to the meaning of cruel, inhuman, or degrading treatment. The Senate reservations stipulated that while the United States is bound by the respective conventions to prevent cruel, inhuman, or degrading treatment, such an obligation only means "cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."232

The Xuncax court recognized that U.S. domestic law does not govern the international legal definition of the norm; such international law would require universal not only U.S.—assent.233 Nevertheless, the court held that defining cruel, inhuman, or degrading treatment in accordance with related constitutional rights:

[D]oes not compel the conclusion that no aspect of the norm can qualify as international law. Where American constitutional law and international law overlap, the voice of this country as part of the consensus rendering the proposition in question a rule of international law is simply embodied in domestic constitutional directives.234

That is, cruel, inhuman, or degrading treatment includes actions that are both universally condemned and specifically prohibited in U.S. federal law. The court held that the claims alleged in the case clearly met this criteria.235

In essence, the Xuncax court held that the scope of the international norm against cruel, inhuman, or degrading treatment, while not definable at its outer periphery, does contain, at its core, ascertainable prohibitions. Hence, a district court in the First Circuit took a position in contradistinction to the Ninth Circuit district court in Forti II. The Forti II court had dismissed the claim under cruel, inhuman, or degrading treatment because the norm, as a whole, was undefinable. In contrast, the Xuncax court held that:

It is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman, or degrading treatment' be fully defined and universally agreed upon before a given action merits the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute 'torture' or

234. Id. at 187.
235. Plaintiffs were all natives of Guatamala. They fled the country after being victimized by Guatamalan military forces. Some of the plaintiffs were subject to torture and arbitrary detention; others were forced to watch as their family members were tortured to death or summarily executed; one plaintiff's father "disappeared."
‘arbitrary detention’ in order to recognize certain conduct as actionable misconduct under that rubric.\textsuperscript{236}

3. Easy Cases Part II: Incontrovertible Non \textit{Jus Cogens} Violations

Many plaintiffs have attempted to use the ATCA to forward various claims that fall outside the well-accepted scope of federal CIL. The ATCA-based part of nearly all of these complaints is frequently dismissed in less than three pages of the court reporter, often in less than three paragraphs, and never with a dissenting opinion. Not all of the claims that fail are this radically removed from the scope of the law of nations, yet they suffer from fatal flaws under the tripartite test, and no dissenting opinion has been filed in their favor. The list of rejected claims includes: expropriation of property, fraud, negligence in aircraft crashes\textsuperscript{237} and mismanaged sea vessels,\textsuperscript{238} free speech,\textsuperscript{239} libel,\textsuperscript{240} child custody law,\textsuperscript{241} and financial misconduct.\textsuperscript{242} We discuss expropriations and fraud only, since they serve as paradigmatic cases.

\textsuperscript{236} \textit{Xuncax}, 886 F. Supp. at 186.

\textsuperscript{237} See Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978) (finding that no evidence supports the claim that negligence constitutes law of nations violation).

\textsuperscript{238} See Damaskinos v. Societa Navigacion Interamericana, S.A., Pan., 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (“Negligence in providing a seaman with a safe place in which to work, and unseaworthiness of a vessel in that respect, are not violations of the law of nations.”); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 294-95 (E.D. Pa. 1963) (noting doctrine of unseaworthiness that allowed compensation for seamen beyond maintenance and cure was particular American principle not found under law of nations); see \textit{also} Khedivial Line, S.A.E. v. Seafarers’ Int’l Union, 278 F.2d 49, 51-52 (2d Cir. 1960) (per curiam) (denying ATCA jurisdiction because unrestricted right of access to harbors by vessels of all nations not a part of law of nations).

\textsuperscript{239} See Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (“However dearly our country holds First Amendment rights . . . a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a ‘law of nations.’”).

\textsuperscript{240} See Akbar v. New York Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980) (“No treaty concerning libel has been noted nor allegedly violated, and plaintiffs have not alleged any violation of ‘the law of nations’ as the term has been interpreted by the courts.”).

\textsuperscript{241} See Huynh Thi Anh v. Levi, 586 F.2d 625, 630 (6th Cir. 1978) (“[T]he ‘law of nations,’ to the extent that it speaks on the subject, does not demand a particular substantive rule regarding custody of alien children.”).

\textsuperscript{242} See Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966) (stating that refusal of life insurance company to pay proceeds is not law of nations violation nor approaches the “calibre of the cases” legitimately found under § 1350); cf. Cohen v. Hartman 634 F.2d 318, 319 (5th Cir. 1981) (per curiam) (holding that converted funds between employer and employee does not involve (a) internal relations nor (b) affect national sovereignty and thus “in no way” is a law of nations violation).
The prohibition of the expropriation of property may arguably constitute emerging CIL, but it is presently implausible for this legal principle to satisfy the *jus cogens* standards under the ATCA doctrine. In fact, the *Filarigita* court used the subordinate status of the proscription of expropriation to contrast the obligatory and universally-accepted status of the prohibition against torture. *Filarigita* explained that proscriptions against expropriation could not satisfy CIL standards—namely, the universality and obligatory prongs—in light of the "sharply conflicting views" among different capital-exporting, capital-importing, socialist-leaning, and capitalist-leaning countries. Although *Filarigita*’s discussion was *dicta*, another ATCA decision has since reached a similar conclusion as part of its holding. In *Jafari v. Islamic Republic of Iran*, the U.S. District Court for the Northern District of Illinois granted a motion to dismiss, in part, because the plaintiff’s expropriation claim clearly failed to satisfy the standards of universality and binding obligation.


244. See *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982). Readers who are familiar with the case law may question why we do not also rely on *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976), a prominent Second Circuit ATCA case that courts frequently cite for the proposition that government expropriation does not rise to the level of a law of nations violation. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 325 n.16 (2d Cir. 1981) (citing *Dreyfus*, 534 F.2d at 30-31); rev’d on other grounds 461 U.S. 480 (1983); *Jafari*, 539 F. Supp. at 215 (discussing *Dreyfus*, 534 F.2d at 30-31); see also *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (using—in context of FSIA—the *Dreyfus* decision as an extreme example of expropriation taken pursuant to Nazi racial decrees not rising to level of minimum human rights violation). In *Dreyfus*, however, the Court of Appeals held that the law of nations operates primarily between states and never between a sovereign and its own nationals. 534 F.2d at 30-31. As a consequence, *Dreyfus* does not hold that expropriation falls short of CIL’s standard of *universality*. Furthermore, the *Dreyfus* holding contributes very little to post-*Filarigita* CIL determinations. *Dreyfus*’ commitment to a state-to-state conception of the law of nations represented a conceptual holdover from pre-Nuremberg years, and, as such, has since been narrowed. *Filarigita*, 630 F.2d at 884 (“Accordingly, we must conclude that the dictum in *Dreyfus v. Von Finck* to the effect that ‘violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law.” (citation omitted)).

Ironically, the *Filarigita* court, while overruling *Dreyfus* in this manner, also cites the opinion for the incorrect proposition. *Filarigita*, 630 F.2d at 888 n.23 (distinguishing *Dreyfus* based on consensus of opinion regarding norm of torture from that of expropriation) (“*Dreyfus v. Von Finck* concerned a forced sale of property, and thus sought to invoke international law in an area in which no consensus view existed.” (citations omitted)). A closer reading of the *Dreyfus* opinion shows that this latter proposition depended on explicit—though outmoded—supposition that states are the only appropriate juridical subjects of international law.

245. See *Jafari*, 539 F. Supp. at 215. The court explained:

It may be foreign to our way of life and thought, but the fact is that governmental expropriation is not so universally abhorred that its prohibition commands the “general assent of civilized nations” a prerequisite to
b. Fraud

Three ATCA cases have confronted and dismissed claims that fraud constitutes a law of nations violation. Plaintiffs have based the plausibility of their claim on the contention that all nations consider fraud immoral and illegal. Judge Friendly, in IIIT v. Vencap, Ltd., concisely responded to the argument: "We cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations." According to Judge Friendly, a law of nations violation is based on mutual—not merely several—concern of the community of nations. Fraud so clearly falls outside of this framework that it has received short shrift from the federal courts.

_id. (citations omitted); see also Guinto v. Marcos, 654 F. Supp. 276, 280 n.1 (S.D. Cal. 1986) ("While there is no consensus on what constitutes a violation of the 'law of nations,' in one area there appears to be a consensus. A taking or expropriation of a foreign national's property by his government is not cognizable under § 1350."); cf. De Sanchez, 770 F.2d at 1397 (discussing expropriations under exceptions of FSIA, the court wrote that "the standards of human rights that have been generally accepted - and hence incorporated into the law of nations—are still limited. They encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment . . . . At present, the taking by a state of its national's property does not contravene the international law of minimum human rights."); id. at 1397 n.16 (collecting several ATCA and non-ATCA cases holding that expropriations do not contravene law of nations).


247. Trans-Continental Inv. Corp., 500 F. Supp. at 570; IIIT, 519 F.2d at 1015; Abiodun, 475 F.2d at 145 (plaintiff contending that "fraud is considered immoral and unlawful by all nations and thus is a violation of the law of nations").

248. 519 F.2d at 1015.

249. See id.; see also Trans-Continental Inv. Corp., 500 F. Supp. at 570 (explaining that despite fact that fraud is a universally recognized tort, "universal recognition does not, per se, make the rule a part of 'the law of nations'"). The element of mutual concern is arguably covered under the tripartite standard of universal obligation that Filartiga first articulated in the ATCA context. See Filartiga, 630 F.2d at 888-89 (discussing, and possibly qualifying, IIIT's test for mutual concern).

250. In Abiodun, for example, the court granted the motion to affirm—without oral argument—the lower court's summary judgment, and rejected the law of nation's claim in one paragraph. Abiodun, 475 F.2d at 145-46 ("[T]here is simply no basis for claiming a violation of the law of nations."). The Trans-Continental Investment court expended four paragraphs on the issue, 500 F. Supp. at 569-70, and, in IIIT, Judge Friendly spent one. IIIT, 519 F.2d at 1015.
D. Lessons from the Litigation

Several insights can be drawn from the Filartiga case line. First, the incorporation of Sabbatino’s sliding-scale—and the tripartite test which follows from it—validates the modern position’s understanding of the Supreme Court’s holding. Properly interpreted, Sabbatino stands both for the proposition that international law is federal common law and for the proposition that courts should refrain from adjudicating international law claims without the requisite degree of codification or international consensus. Second, and as a corollary point, the structure of the litigation illuminates the distinction between international law, in general, and actionable CIL. The latter category—which occupies a preferred status in Sabbatino’s sliding scale—contains those claims appropriate for federal judicial determination. The tripartite limiting principle helps ensure that courts “focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.”

Third, a thorough account of the prevailing judicial practice of finding and applying CIL demonstrates the systematic nature of these inquiries. The availability of ample documents and international legal instruments enables effective adjudication of the status of CIL. Moreover, the uniform results in the case law belie the revisionist portrayal of CIL as “often unwritten . . . unsettled . . . difficult to verify” and the “contours [of which] are often uncertain.” At worst, such traits might be fairly attributed to the boundary between emergent CIL and established CIL. These characteristics cannot, however, be fairly attributed to justiciable CIL; that is jus cogens CIL. Guided by Sabbatino’s articulation of the proper role of courts, CIL’s incorporation into federal common law is limited to universal, definable, and obligatory norms—the incontrovertible, easy cases. Aspects of CIL which are “difficult to verify” or “uncertain” do not survive the rigorous standards articulated by federal courts.

Finally, the structure of the modern litigation informs the remainder of this article. The following part discusses recent congressional ac-

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251. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). In Sabbatino, the court declared that expropriations occupied an ambiguous status in international law and, as such, pronouncements on and enforcement of such issues should be committed to the political branches. See id. A similar framework for approaching such issues informed the Congress’s enactment of the TVPA (and its concurrent endorsement of the Filartiga doctrine). That is, dissenting members of Congress expressed trepidation that the judiciary would make pronouncements on international human rights issues in foreign affairs. The majority of Congress overrode these concerns, in significant part because torture—a universal and unambiguous CIL—did not present such political or ideological concerns.

252. Bradley & Goldsmith, Customary International Law, supra note 24, at 855.

253. Id. at 858; see also Weisburd, State Courts, supra note 24, at 9 (stating that rights and duties under customary international law are difficult to define).
tion regarding the *Filartiga* doctrine. The contours of the modern litigation served as the background for the TVPA congressional deliberations and, consequently, received significant treatment in the committee reports. Congress, fully appreciating the more than decade-long expansion of the case law, clearly expressed its intention to leave these precedential developments undisturbed. Accordingly, the TVPA and its legislative history informs our evaluation of the revisionist position.

III. **CONGRESSIONAL ENDORSEMENT OF THE MODERN POSITION: EVALUATING THE REVISIONIST POSITION IN LIGHT OF THE TVPA**

In March 1992, Congress provided a clear political branch signal: passage of the Torture Victim Protection Act as a statutory supplement to the ATCA.\(^\text{254}\) The importance of this legislation for evaluating the revisionist position should not be underestimated. The revisionist project argues that the causes of action under the current *Filartiga* doctrine are constitutionally suspect without proper political branch authorization. Our discussion of the TVPA and its legislative history demonstrates that the political branch authorization—if required—has been given. In this part, we assess the revisionists’ reasons for engaging in the radical rethinking of CIL’s status as federal common law, given that this area of the case law is immune from the revisionist critique taken on its own terms.\(^\text{255}\)

Our analysis of the TVPA also raises other issues. Specifically, we argue that Congress’s own conception of its institutional role belies the revisionist claim that the federal judiciary has unduly usurped legislative powers. Our treatment of the TVPA’s legislative history also demonstrates that the *Filartiga* line does not “depart from well-accepted notions of American representative democracy, federal com-

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\(^{255}\) In a sense, this part of our Article subjects the revisionist project to a fatal test: If we suspend the conventional wisdom that CIL is part of federal common law and adopt, in full, the revisionist default rule—that CIL is not federal law without a political branch signal—what effect does that have on the only line of cases relying upon the modern position? That is, if we assume, for the sake of argument, that “CIL is not supreme federal law unless the federal political branches say so,” does that actually disturb the *Filartiga* line of cases? *See Bradley & Goldsmith, Customary International Law, supra* note 24, at 862. The legislative history of the TVPA suggests not. In this part, we analyze the implications of the TVPA/ATCA interplay for the potential applicability of the revisionist claim to case law outside § 1350.
mon law, separation of powers, and federalism.\textsuperscript{256} In passing the TVPA, Congress completed a fourfold endeavor: Congress (1) issued a statement of support for the entire \textit{Filartiga} line of cases, (2) specifically enumerated two human rights violations as cognizable § 1350 causes of action, (3) affirmatively sanctioned the incorporation of customary international human rights law as a matter of federal common law, and (4) rebuffed recalcitrant judges for not already having done the same.

A. The Central Importance of the TVPA

After March 1992, the political branches’ position on \textit{Filartiga} and its progeny leaves little to imagination. Both Houses of Congress responded directly to Judge Bork’s failure to follow the \textit{Filartiga} line, passing the TVPA by overwhelming majorities. Congress intended the TVPA not to replace, but rather to solidify and extend, the ATCA’s coverage.\textsuperscript{257} Accordingly, Congress stipulated two specific causes of action—official torture and extrajudicial killing—and purposefully left the ATCA intact to continue the broader \textit{Filartiga} doctrine’s causes of action.

The TVPA and its legislative history should dissolve many of the concerns raised by the revisionist position. Yet, the TVPA receives only brief mention in the revisionist critique, albeit as an exemplary exercise of appropriately congressional authority. This concession for the TVPA, however, does not admit to its direct connections to the \textit{Filartiga} progeny. The TVPA and its legislative history provide specific evidence of congressional authorization of the \textit{Filartiga} doctrine, and its codification at § 1350 should not be underestimated.\textsuperscript{258}

Evaluating the \textit{Filartiga} doctrine and the validity of causes of action under the ATCA requires a close consideration of the TVPA.\textsuperscript{259} Not only is the TVPA the most analogous statute to which courts would resort for clarification,\textsuperscript{260} but Congress deliberately attempted to have the TVPA support the ATCA and its attendant litigation. Also, as Congress periodically recodifies § 1350, the significant discussion regarding the ATCA provides an understanding of the contemporary legislative intent behind the law. This significance of the TVPA is well recognized by federal courts. In ATCA cases, several decisions have

\textsuperscript{256} Bradley & Goldsmith, \textit{Customary International Law}, supra note 24, at 821.

\textsuperscript{257} As law of nations violations, official torture and extrajudicial killings are now undeniable subsets of § 1350’s causes of action. \textit{See supra} notes 178 and 192 and accompanying text.


\textsuperscript{260} \textit{See, e.g.}, \textit{id.} at 189-91 (using TVPA as most analogous federal statute to ATCA for questions of statute of limitations).
already relied on the TVPA to assess the acceptable contours of causes of action under § 1350 and the broader Filartiga doctrine.261

B. The TVPA’s Satisfaction of the Revisionist Default Rule

This section casts the greatest doubt on the revisionists’ invitation to abandon the well-accepted modern position on CIL. The TVPA embodies the act of incorporation by the federal political branches that, according to the revisionist default rule, should effectively preserve § 1350’s incorporation of CIL into federal law.262 This section demonstrates that the TVPA not only directly incorporates two specific customary international human rights violations, but that it also sanctifies the continued adjudication of other similar—though unenumerated—human rights violations in accordance with Filartiga’s holding. The results of this analysis therefore put into question the need to embark on the revisionists’ endeavor at all, since the state of the law would literally remain the same.

As previously mentioned, this section also argues that Filartiga, as a wellspring for the modern position, abides by “well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism.”263 As we point out in this section, and evaluate more fully in our conclusion,264 Congress greeted Filartiga’s view of federal common law with approval.265 The Senate, whose members most directly represent the fifty states at the federal level, subscribes to the modern position.266 Additionally, no U.S. state has claimed the prerogative to define its own interpretation of


262. Cf. Bradley & Goldsmith, Customary International Law, supra note 24, at 856-57 (discussing problems with recognizing CIL as a part of federal common law).

263. Id. at 821; see also id. at 857 (“[T]he modern position that CIL is federal common law is in tension with basic notions of American representative democracy.”).

264. See discussion infra Part V.

265. See infra text accompanying notes 273-75.

266. See infra text accompanying note 278.
actionable CIL—such as whether torture, extrajudicial killing, or genocide should be legal.\textsuperscript{267}

On its face, the TVPA textually incorporates elements of CIL, subcomponents of which are left to broader judicial interpretation. Under section 2, an individual acting under the color of law of a foreign nation who subjects a person to torture or extrajudicial killing may be held liable.\textsuperscript{268} In defining this section, the congressional plan is that international law should infuse the meaning of the pertinent terms. Specifically, the section of the statute that defines torture and extrajudicial killings, does so by reference to CIL standards.\textsuperscript{269} The definition of torture is directly taken, almost verbatim, from the Torture Convention. Also, the Senate Report discusses the Convention, at significant length, and expressly states that the Act is designed to fulfill the United States obligations under it.\textsuperscript{270}

The scope and general understanding of extrajudicial killing is also governed by standards of international law. First, the statute’s concept of extrajudicial killings is derived from Common Article 3 of the Geneva Conventions.\textsuperscript{271} Second, a critical clause anticipates judicial application and interpretation of unlawful killing as defined “under international law.”\textsuperscript{272} The clause was drafted into the statute for specific reasons; in the congressional hearings leading up to the Act, certain legislators were concerned that extrajudicial killings might encompass arguably legitimate state-sponsored deaths, such as the legalized use of deadly force. The legal expert, to whom this concern was posed, advised the Senate committee that the problem could be resolved by having the statute refer either to national or international laws. The statute, in its final form, stipulates that the term “extrajudicial killing” shall “not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”\textsuperscript{273} Thus, the Congress, ultimately decided to define the scope of this exemption by incorporating international law directly and, more remarkably, exclusively, instead of the other two suggested alternatives (defining the exemption according to solely domestic law or both domestic and international law).

\textsuperscript{267} See infra text accompanying notes 295-96.
\textsuperscript{268} See TVPA, supra note 254, at § 1350(2)(a)(1)-(2).
\textsuperscript{269} See House Report, supra note 261, at 4 (“[The TVPA] defines ‘torture’ and ‘extrajudicial killing’ in accordance with international standards.”).
\textsuperscript{272} TVPA, supra note 254, at § 1350(3)(a).
\textsuperscript{273} Id.
With the addition of the TVPA, § 1350's references to CIL now exemplify a range of degrees of specifications. The entire distinction between legal and extrajudicial killings arguably turns on its exemption clause which refers the judiciary to more open-ended international law. Furthermore, the statute's reference to lawful killing as defined "under international law" remarkably resembles the "law of nations" provision of the 1790 statute that the revisionists admit satisfies their default rule.\textsuperscript{274} The degree of specification in the definition of extrajudicial killings and this eighteenth century statute also shares obvious affinities with the First Congress's design of the ATCA's "law of nations" clause. As such, the capacity of both the TVPA and the 1790 statute to clear the revisionist default rule should confirm the similar capacity of the ATCA.

The revisionists' endorsement of the TVPA and their corresponding lack of a limiting principle for such degrees of statutory specification leaves their position in a quandary. According to the Supreme Court (as well as Congress), such open-ended statutory provisions, though engines for common law interpretation, are the products of legislative prerogative.\textsuperscript{275}

\textsuperscript{274} See Bradley & Goldsmith, Customary International Law, supra note 24, at 819 & n.24 (discussing Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113, 113-14 (codified at 18 U.S.C. § 1651 (1994))).

\textsuperscript{275} In the 1820 case United States v. Smith, the Court upheld a congressional statute that authorized the judiciary to interpret and apply "the crime of piracy, as defined by the law of nations." 18 U.S. (5 Wheat.) 153, 153 n.(a) (1820) (quoting Act of the 3d of March 1819, § 5). The Court explained that Congress possessed the prerogative to decide how much definitional leeway to provide, id. at 158-59; and, therefore, the Court upheld the statute despite having recently decided United States v. Hudson, the case that is commonly thought of as Erie's progenitor in this area of law. United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) (announcing the end to federal criminal common law and, as such, erecting a similar barrier to judicial rulemaking as that performed by Erie). Writing for the majority, Justice Story conveyed this lesson: Criticisms of judicial common law, exercised pursuant to broadly worded statutory clauses, must propose an effective limiting principle or else they engulf most all statutes with both lesser and greater degrees of linguistic specification. Smith, 18 U.S. at 160. In Smith, the statutory clause, "as defined by the law of nations," was Congress's choice of degree of specification; therefore, Hudson's mandate against courts' independently fashioning a common law of crimes was inapplicable. Id. at 153 n.(a).

Smith's ruling holds true for today: "[O]bjections to Congress's use of the courts to formulate federal law are properly directed to Congress, rather than imposed upon Congress by the Supreme Court." Field, Sources of Law, supra note 38, at 938.

The connection between Smith's holding and the ATCA runs even deeper. Notably, the Court illustrated its argument by use of the same 1790 statute that the revisionists cite as satisfying their default rule. Smith, 18 U.S. at 158. This fact ties the connection between the 1790 statute and the ATCA even tighter. That is, the statute the revisionists endorse shares similar judicial rulemaking concerns as the statute in Smith. Those statutory concerns—and the resolution of those concerns—have also been directly linked to the ATCA. That is, the Supreme Court has subsequently directly tied the lesson of Smith's holding to the degree of statutory specification of § 1350. In Ex parte Quirin, 317 U.S. 1 (1942), a unanimous Court upheld a congressional statute that granted jurisdiction to military commissions for trials of noncitizens under offenses committed in violation of the "precepts of the law of nations, and more
Section 1350 case law, in fact, benefits from clear congressional statements regarding the judiciary’s use of federal common law. Most significantly, the Senate Report for the TVPA clearly anticipates and encourages the continued judicial incorporation of international human rights law as an enclave of federal common law:

While the legislation specifically provides Federal districts [sic] courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. *International human rights cases predictably raise legal issues—such as interpretations of international law—that are matters of Federal common law and within the particular expertise of Federal courts.*

Due to the expansive scope of this congressional statement and the legal significance of actually grafting the TVPA as part of the statutory notes for § 1350, it would require heroics in judicial activism to deny this excerpt’s direct application to the ATCA. The statement is also buttressed by other expressions of clear support for the modern position, including explicit approval of *Filartiga’s* original holding.

Senate statements, in particular, create particular difficulties for the revisionist account. The Senate is the political organ that most di-

particularly the law of war.” *Id.* at 28. The Court, in strong terms, first, rejected the contention that Congress could not incorporate the law of war and leave its interpretation to the common law of courts and, second, rejected the contention that the courts could not dutifully exercise such authority:

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing “the crime of piracy, as defined by the law of nations” is an appropriate exercise of its constitutional authority, *Art. I, § 8, cl. 10,* “to define and punish” the offense, since it has adopted by reference the sufficiently precise definition of international law. *United States v. Smith.* Similarly, by the reference in the 15th Article of War to “offenders or offenses that . . . by the law of war may be triable by such military commissions,” Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course. *Id.* at 29-30 (citations omitted). As shown in this excerpt, the Court relied on *Smith* as its first basis of precedence. And, to help seal its argument, the Court cited the ATCA, by attaching a footnote, and quoting it as the first statutory example to prove the stated legal principles. *Id.* at 30 n.6. This direct connection, though in dicta, demonstrates the Court’s acknowledgment of the relevance of *Smith’s* (and now *Ex parte Quirin’s*) lesson for the ATCA. The ATCA, as a statute similar in kind to the statutes in both these cases, should similarly survive judicial rulemaking concerns due to its congressional pedigree. Concerns with such open-endedness should be taken up with the statute’s creators—the political branches.

276. Senate Report, *supra* note 270, at n.6 (emphasis added).
277. *Id.* at 3-4.
rectly represents the interests of the states. Yet, these elected representatives, whose interests the revisionist position argues are undermined by the federal common law of CIL, report that “state courts are not likely to be inclined or well-suited to consider these cases.” Indeed, the Report’s statement suggests that the Senate adheres to the broader view that international human rights cases, in general, should be consigned as an enclave of federal common law. In short, a federalism concern is conspicuously lacking.

Congress’s stance on these issues is not limited to cases of official torture and extrajudicial killing. In passing the TVPA, Congress certified the political branches’ approval that other universally condemned human rights violations should continue to be applied by federal courts under the Filartiga doctrine. The revisionist position offers a different account—that the TVPA, “[b]y creating a federal cause of action for torture . . . arguably provides a basis for federal question jurisdiction for suits involving torture.” The statute and its legislative history, however, demonstrate a congressional commitment to a range of causes of action, some enumerated—i.e., torture and extrajudicial killings—and some not.

In the revisionist account, the TVPA is presented as one of the exemplary acts in which Congress may incorporate “select aspects of CIL into federal statutory law,” thus preserving the appropriate role for the political branches. In contrast, the legislative history con-

278. Bradley & Goldsmith, Customary International Law, supra note 24, at 857 (“[T]he modern position that CIL is federal common law is in tension with basic notions of American representative democracy.”).
279. See text accompanying note 292.
280. Congress, heeding the possibility of misinterpretation, explained that the specification of the two particular violations does not exhaust the list of potential claims under § 1350. House Report, supra note 261, at 86; Senate Report, supra note 270, at 3.

Admittedly, other commentators, in anticipation of the TVPA, suggested that the congressional enactment of the TVPA would limit § 1350 to these two enumerated causes of action. See, e.g., Kathryn L. Pryor, Does the Torture Victim Protection Act Signal the Demise of the Alien Tort Claims Act?, 29 Va. J. Int'l L. 969, 1024 (1989). With the advantage of hindsight, these views can now be understood as premature assessments of the TVPA. Pryor’s article, for instance, appeared one year before the Senate hearings on the issue; two years before the publication of the legislative history reports from the House: Judiciary Committee and the Senate Judiciary Committee; and three years before the enactment of the law. One could be misled about the currency of Pryor’s position due to a recent law review article which uses her argument as a scarecrow but misdates the article as 1991. Christopher W. Haffke, The Torture Victim Protection Act: More Symbol Than Substance, 43 Emory L.J. 1467, 1481 n.71 (1994).

281. Bradley & Goldsmith, Customary International Law, supra note 24, at 873 n.356 (citing Weisburd, State Courts, supra note 24, at 3-4); Weisburd, State Courts, supra note 24, at 56 (“Congress can enact statutes creating federal causes of action for violations of international law, as it has done with respect to torture, for example.”).
282. Compare Bradley & Goldsmith, Customary International Law, supra note 24, at 819 & n.24, with Weisburd, State Courts, supra note 24, at 873; see also Bradley & Goldsmith, Human Rights Litigation, supra note 24, at 365.
firms that Congress adopted a different view of its capacities and inclinations. Congress manifested a clear (and the Senate, for its part, most emphatically) satisfaction both with the loose degree of specification in § 1350 and with the concomitant exercise of ongoing federal court interpretation of the respective international legal principles.

After 1992, judges who wish to adhere to congressional intentions in § 1350 suits should feel relatively free to incorporate customary international norms in addition to those of torture and extrajudicial killing. In passing the TVPA, Congress perceived its task to be one of laying to rest the persisting question of whether the ATCA constituted merely a jurisdictional statute or also provided a substantive cause of action. Congress textually stipulated torture and extrajudicial killing to clarify and expand, not to exhaust, the possible causes of action. The congressional subcommittee asked for assurances from its witnesses that the legislation would endorse rather than weaken other claims under § 1350 law. Representative Yatrom, a principal sponsor of the bill and chair of its originating subcommittee, began the House hearings with this understanding:

International human rights violators visiting or residing in the United States have formerly been held liable to money damages under the Alien Tort Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it. Federal courts should not allow congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them.

In short, Congress wanted to confirm Filartiga's apprehension of § 1350, and the TVPA presented such an opportunity.

To ensure that Representative Yatrom's words were honored, the House committee report provided clear support for prospective federal common law incorporation of other customary international

283. In the first-generation of scholarship regarding the ATCA, much of the discussion focused on whether § 1350 was merely a jurisdictional statute or also included a substantive cause of action. According to congressional testimony, the TVPA offered Congress an opportunity to end that debate by demonstrating the inherent substantive component of the statute. Senate TVPA Hearings, supra note 254, at 40-41 (explaining that TVPA would "eliminate any uncertainty here and would compliment the ongoing litigation efforts under the Alien Tort Claims Act" (emphasis added)); The Torture Victim Protection Act: Hearing and Markup Before the House Comm. on Foreign Affairs and Its Subcomm. on Human Rights and Int'l Org., 100th Cong., 86-87 (1988) [hereinafter TVPA House Hearings] (statement of Rep. Solomon) ("[The TVPA] will serve, in my judgment, to clarify a technical point in the existing law.").

284. TVPA House Hearings, supra note 283, at 71-72 (statement of Rep. Yatrom) (asking all panelists to assure committee that the TVPA would not weaken the ATCA).


286. Id. at 72 (statement of Patricia Rengel) (presenting TVPA as mechanism for "codifying] in a way for the nation as a whole what were the intentions . . . of those framers of Section 1350").
human rights law: "[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." This language ought to satisfy the revisionist default rule. Congress affirmatively left these other areas of CIL relatively open-ended. In this capacity, the TVPA’s sanction is forward looking; courts are free to interpret and apply CIL norms that currently exist as well as those that may emerge.

Thus far we have addressed the TVPA’s implications for CIL as federal common law only prospectively. That analysis should secure Filartiga’s footing for future litigation. Yet, this Article’s discussion has left unanswered the question of Filartiga’s status prior to the TVPA, which also implicates § 1350 litigation that will continue outside of the TVPA. More significantly, by all appearances, we have helped prove a significant part of the revisionist position. That is, Judge Bork was right: federal judges should not have extended § 1350’s cause of action to post-eighteenth century conceptions of CIL, unless a contemporary Congress had already done so. Or, as the revisionist position might put it: In ATCA suits, courts should not have incorporated modern CIL into federal common law in the face of political branch silence. Thus, according to the revisionist account, the TVPA validates their interbranch claim that Congress, the appropriate institution for these matters, responded synergistically to provide the necessary political direction that judges required before acting. The following section argues that the TVPA’s legislative history belies this account.

C. Reading the ATCA in Light of the TVPA

The legislative history of the TVPA demonstrates Congress’s view of the modern position. Two very different accounts could explain Congress’s action: (1) the revisionist position—Congress in its institutional capacity provided needed political branch direction for federal judges who could not legitimately incorporate CIL without such a directive; or (2) the modern position—Filartiga was correctly decided according to federal common law powers, and subsequent congressional action was primarily remedial for opposing judges who rejected Filartiga’s reasoning. Indeed, as a corollary to the revisionist perspective, one might contend that if Filartiga was firmly grounded in its use of federal common law, the TVPA would not have been required. Conversely, the modern position would be strongly supported by

287. House Report, supra note 261, at 86.
proof that Congress considered its legislative action to be
redundant.288

Numerous statements from the legislative history dispute the
characterization of the TVPA as illustrating that Congress, rather than the
courts, is better positioned to fine-tune the application of CIL to the
requirements of other domestic law. In particular, the legislative his-
tory contains important, retrospective congressional statements re-
garding the legitimacy of Filartiga’s doctrinal basis. Senator Specter,
the TVPA’s main sponsor, considered its legislative stamp of approval
to be primarily superfluous, yet a necessary corrective measure for the
anomalous turn by the D.C. Circuit: “One might think . . . it would be
unnecessary to have legislation on such a subject, because torture is
such a heinous offense, such a heinous crime, that the courts would
have jurisdiction without a formal legislative measure. This is neces-
sary because of litigated cases in the field, most particularly [Tel-
Oren].”289 Judge Bork’s wayward turn had apparently raised a legisla-
tive eyebrow,290 and the TVPA was adopted specifically to counter his
disagreeable stand.291 The Congress both lauded § 1350 case law
(which developed absent explicit contemporary political branch au-
thorization) and acted to sustain Filartiga’s momentum: “The TVPA
would establish an unambiguous and modern basis for a cause of ac-
tion that has been successfully maintained under an existing law, [the
ATCA]. Section 1350 has other important uses and should not be
replaced.”292

288. It is impossible, of course, to find a statement that the legislative action was
wholly redundant since it included a novel extension of the permissible plaintiff class
to include U.S. citizens. As our discussion reveals, Congress considered this “gap
filling” measure the only item that would actually change § 1350’s case law. As far as
Congress was concerned, the rest of the TVPA clarified what was already there. 137
closes a gap in the law. Under court decisions, aliens have the right to sue their tor-
turers under the Alien Tort Claims Act, but not U.S. citizens. This bill would extend
protection to U.S. citizens while retaining the current law’s protection of aliens.” (em-
phasis added)); see also 135 Cong. Rec. 22716 (1989) (statement of Sen. Leach)
(describing clarifying intent of TVPA to ensure continuation of ATCA judicial
successes).

289. These were Senator Specter’s first words by way of introduction of the bill to

290. Senate Report, supra note 270, at 4-5 (contrasting Judge Bork’s anomalous
stance with the fact that, otherwise, “the Filartiga case has met with general
approval”).

291. Senate TVPA Hearings, supra note 254, at 65 (Statement of Sen. Specter)
(“Well, that is why the legislation is really brought. The Tel-Oren case . . . and this
bill will lay it all to rest.”); House Report, supra note 261, at 86-87; Senate Report,
supra note 270, at 4; see also Rachael E. Schwartz, “And Tomorrow?” The Torture
Judge Bork the expression of legislative intent upon which he had insisted, Congress
also admonished him that he was wrong to require it in the first place.”).

In short, the Senate Report contains meaningful analysis of *Filartiga* and its progeny, which proceeded without the 1992 legislative action. The congressional analysis uniformly approves of the prevailing judicial interpretations of international law. Specifically, the Senate Report cites other ATCA cases to underscore its position: “[T]orture or summary executions do not exhaust the list of action that may appropriately be covered by section 1350.”

D. *The Paradox of Political Branch Authorization of the Modern Position*

The legislative history of the TVPA calls into question a fundamental assumption of the revisionist position: Do the political branches favor the modern position? As discussed in part III, Congress offered strong indications of support for the modern position in adopting the TVPA. Specifically, in this section we want to highlight four ways in which the Congress “authorized” the modern position that CIL is federal common law. First, Congress suggested that interpreting international law exceeds the institutional capacity of state courts: “[S]tate courts are not likely to be inclined or well-suited to consider [international law] cases.” Second, Congress expressly stated that CIL is federal common law: “*International human rights cases predictably raise legal issues such as interpretations of international law that are matters of Federal common law and within the particular expertise of Federal courts.*”

Third, Congress in part explained its constitutional authority to create alien-alien causes of action by citing *Paquete Habana*’s broad assertion: “*International law is part of our law.*” Fourth, Congress cited the *Filartiga* precedent with approval. Indeed, Congress arguably utilized the *Filartiga* holding and its progeny as the model for fashioning the cause of action established in the TVPA. The understanding of *Filartiga* which Congress approved strongly suggests congressional endorsement of the modern position:

After finding that torture has been condemned and renounced as an instrument of official policy by virtually all countries of the world,

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294. See Bradley & Goldsmith, *Customary International Law*, *supra* note 24, at 869 (“Far from authorizing the application of the new CIL as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status.”).

295. See text accompanying notes 254-319.


297. *Id.* (emphasis added).


300. See *supra* notes 288-89.
Chief Judge Irving R. Kaufman further held that customary international law provides individuals with the right to be free from torture by government officials. Consequently, section 1350 gave federal courts jurisdiction over allegations of torture since torture violates the "law of nations." 301

The legislative history makes clear a single-minded commitment not to have the TVPA disturb the ongoing ATCA litigation under separate causes of action. This evidence of political branch support for the modern position demonstrates Congress' expectation that federal courts will find and apply CIL.

The claim that the political branches accept the modern view seems, at first blush, paradoxical. Common law, after all, refers to judicial lawmaking in the absence of political branch authorization. The revisionists might claim that the critique of the modern position challenges only common law making in the face of political branch silence or opposition. According to the revisionist view, the evidence we have provided demonstrates Congress' relatively narrow consent to the incorporation of CIL pursuant to the TVPA. Recalling that the force of the revisionist position resides in its application to future scenarios wherein courts are confronted with congressional silence, the arguments advanced in this section might seem to beg the question. The agreement among the political and judicial branches on the propriety of the modern position, however, restructures the way scholars, lawyers, and judges should go about constructing default rules. Congress generally supports the understanding of CIL as federal law often found and applied by federal judges. As such, the revisionist default rule governing CIL incorporation reflects an inappropriate presumption. Universal CIL norms should be considered federal common law in the absence of a political branch signal to the contrary.

E. Our Rebuttal to Bradley and Goldsmith's Response

Bradley and Goldsmith's response to our discussion of the TVPA demonstrates the malleability of the revisionist default rule. Their argument effectively strips the legislation of its meaning. First, they take the position that Congress, in passing the TVPA, did not endorse the Filartiga approach. Second, and more provocatively, they suggest that the TVPA should be interpreted as a limitation on § 1350 suits—to include only torture and extrajudicial killings. Bradley and Goldsmith's position frustrates the very democratic principles to which their project purportedly aspires to uphold. That is, their interpretation of the TVPA resists the express statements of the 1992 Congress, and introduces what Congress perhaps feared most in passing the legislation—undermining the modern litigation.

301. Senate Report, supra note 270, at 3-4 (emphasis added).
Before addressing Bradley and Goldsmith's position specifically, it is worth noting that the TVPA received only passing treatment in earlier revisionists' works, despite the statute's strong connections to *Filartiga* and the modern ATCA litigation. The revisionist account of the TVPA indicated only a superficial read of the statute's title, and never spoke to even the possible significance of the pervasive endorsements of *Filartiga* throughout the legislative history. This surface treatment of what has been termed by federal courts as the "codification" and "endorsement" of the *Filartiga* doctrine, while at the same time assailing that doctrine for inadequate political branch support, casts doubt on the revisionist enterprise.

The spin that Bradley and Goldsmith now put on the legislative background to the TVPA is also ill-founded. As we had anticipated, Bradley and Goldsmith now offer the following account of the legislation’s context: Congress provided a new cause of action under § 1350 in order to satisfy the appropriate demand of Judge Bork that courts need to receive such political authorization before acting. Although we already responded to this version of history above, it is worth emphasizing the common view on these matters: "[W]hile giving Judge Bork the expression of legislative intent upon which he had insisted, Congress also admonished him that he was wrong to require it in the first place."

Moreover, Bradley and Goldsmith offer no response to the statements by individual congressional representatives and the committee reports, indicating that the TVPA was, indeed, largely redundant with regard to suits by noncitizens under the ATCA. The TVPA did not create a new cause of action for noncitizens, but instead rebuked Judge Bork for not recognizing it was already there.

The legislative record is also filled with statements by the bill’s sponsors, other legislators, and expert witnesses, all agreeing that the


303. Bradley and Goldsmith explained that the TVPA was a proper act of incorporation “with respect to torture cases”; cited Arthur Weisburd’s similarly brief statements about the TVPA; and stated that “[b]y creating a federal cause of action for torture, the Act arguably provides a basis for federal question jurisdiction for suits involving torture.” Bradley & Goldsmith, *Customary International Law*, supra note 24, at 873 & n.356 (emphasis added).

304. Hilao v. Estate of Marcos, 103 F.3d 767, 778 (9th Cir. 1996); Kadie v. Karadzic, 74 F.3d 377, 378 (2d Cir. 1996); see also Xuncax v. Gramajo, 886 F. Supp. 162, 181 n.2 (D. Mass. 1995) (stating that “in enacting the TVPA, Congress has expressed its approval of the *Filartiga* line of cases”).

305. Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (“In enacting the TVPA, Congress endorsed the *Filartiga* line of cases . . .”); Xuncax, 886 F. Supp. at 172 (“In enacting the Torture Victim Protection Act of 1991, Congress apparently endorsed this approach.”).

306. See *supra* text accompanying notes 288-89.


TVPA would—and should—act as an endorsement of the *Filartiga* litigation.\(^{309}\) This understanding finds clear expression in both the House and Senate Reports.\(^{310}\) Nevertheless, Bradley and Goldsmith assert the opposite: "It is extremely unlikely that the members of Congress who demanded these changes and ultimately voted for the TVPA would have assented to the much broader, open-ended, and undefined *Filartiga* approach . . . . [T]he TVPA should not be read as implicitly ratifying *Filartiga*."\(^{311}\) Such inferences can only be drawn by ignoring the clear statements by Congress that it intended *not to disturb*, but rather to "strengthen and clarify" the *Filartiga* doctrine. No direct statements by a single congressperson support Bradley and Goldsmith's position.

Thus, when Bradley and Goldsmith object that Congress would not narrowly stipulate two causes of action and leave the others open-ended, they are flatly wrong. Congress left the other causes of action unstipulated *in order* to have the federal courts develop the doctrine accordingly.\(^{312}\) In rebuttal, Bradley and Goldsmith characterize our evidence as "consist[ing] exclusively of snippets of legislative history."\(^{313}\) Their minimization of the importance of the TVPA's legislative history in this regard is indefensible. Consider, for example, the amicus brief of leading federal jurisdiction and international law professors—including Professors David Bederman, Erwin Chemersnisky, William Dodge, Martha Field, Burke Marshall, Judith Resnik, David Shapiro, and William Van Alsyne—submitted to the Supreme Court:

Congress erased all doubt about the effect of the ATCA to authorize suit when it enacted the Torture Victim Protection Act of 1991 . . . . Both the House and Senate Reports expressly evince Congress's understanding that a "remedy" for such offenses was "already available" to aliens under the ATCA. Further, the legislative history emphasizes that the ATCA "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."\(^{314}\)

\(^{309}\) See *supra* text accompanying notes 288-89.

\(^{310}\) *Id.*


\(^{312}\) Congress, thus, in the background of the legislation provided its reasons for not stipulating other causes of action; yet members of the revisionist camp fail to listen. Instead, Bradley and Goldsmith, in rebuttal, further define the degree of specification requirement for the revisionist default rule. In the face of the TVPA's legislative history, they now assert the need for direct, textually explicit legislative statements to permit federal courts to incorporate CIL as federal law. This move seems to be a hardening of their position, notably to a point that, we believe, practically takes the "common" out of "federal common law."


The consensus of legal opinion expressed in the amicus brief recognizes the significance of these extensive sections of the TVPA’s legislative history.

In addition, Bradley and Goldsmith contend that in passing the TVPA, Congress was “far from ratifying the wholesale incorporation of CIL assumed by Filartiga,” and that Congress did not “federalize all CIL human rights prohibitions.” These arguments tilt at windmills. We have been careful to explain that the Filartiga precedent supports the incorporation of universal, obligatory and well-defined CIL into federal common law; and that the TVPA stands for the same. As we explained, this narrow band of CIL encompasses only jus cogens violations such as torture, extrajudicial killings, genocide, disappearances, and slavery. We have never assumed that Congress adopted (or would adopt) a “wholesale incorporation” of all CIL, nor that the federal courts under Filartiga would accept “wholesale incorporation,” either. Accordingly, Bradley and Goldsmith’s responses miss the mark and simply confuse the issue. For example, “it makes no sense whatsoever,” they write, “to read the TVPA as implicitly federalizing, without procedural or substantive limitation, other CIL human rights norms, most of which are much less settled and central than torture and extrajudicial killing.” Such statements, which form a central part of Bradley and Goldsmith’s rebuttal, are easy to make, yet avoid the crux of the argument.

Moreover, Bradley and Goldsmith not only argue that Congress did not endorse the Filartiga line of cases, they also suggest that the TVPA should be understood as a statutory narrowing of § 1350 litigation to only torture and extrajudicial killings. Their argument here strays farthest from democratic principles by turning a deaf ear to the will of Congress. If nothing else, one concern pervaded the legislative history of the TVPA: Adoption of the statute, including the specification of two causes of action, should not hinder the successful development of other causes of action under the ATCA. Congress emphatically tried to prevent the misuses of the TVPA to which Bradley and Goldsmith put it.

316. Id. at 366 (emphasis added).
317. Id. (emphasis added).
318. Id. at 365-66 (emphasis added).
319. See supra note 276 (discussing the desire of Congress to buttress § 1350 litigation with the TVPA).
320. See Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 380 (E.D. La. 1997) (“Congress did not intend for the TVPA to impinge on the scope of § 1350 or change the ‘law of nations.’ Congress clearly meant for ‘other norms’ and future rules of international customary law to be redressable under § 1350.”); see also supra text accompanying notes 295-98.
Ultimately, the position Bradley and Goldsmith stake out on the TVPA reveals a great deal about both the substantive character and the potential abuses of the revisionist default rule. The consensus view is that Congress, in passing the TVPA: (1) At a minimum, tried to ensure the act would not undermine the litigation of other causes of action under the ATCA; and (2) expressly endorsed the principal contours of the Filartiga doctrine.321 Yet, Bradley and Goldsmith quarrel with the record and infer the opposite of express congressional statements. In short, Bradley and Goldsmith’s attempt to denude the legislation of its well-understood meaning points to the hollowness of their democracy and separation-of-powers concerns; it also indicates the unsettling malleability of the revisionists’ standards for determining both what constitutes a political branch signal and why the signal matters.

IV. Conclusion

Since Judge Kaufman’s now famous opinion in Filartiga, U.S. federal courts have played an increasingly important role in the transnational struggle to promote fundamental human rights.322 Until the enactment of the TVPA in 1992, the Filartiga case line developed without explicit political branch authorization of the sort prescribed in the revisionist default rule. During this period—from Filartiga to the TVPA—federal courts embraced the modern position that CIL is federal common law. We explained in part II that federal courts—relying on the Supreme Court’s reasoning in Sabbatino—fashioned federal common law causes of action in ATCA cases. As such, the pre-TVPA § 1350 case law heavily relied on the modern position. As we described in part III, however, the TVPA changed the jurisprudential landscape. In the post-TVPA era, federal courts no longer need the modern position to find federal causes of action in § 1350 cases (the political branches authorized virtually every cause of action that had succeeded in the Filartiga line).

The interplay between the TVPA and the structure of the modern litigation suggests two related rejoinders to the revisionist position.

321. See supra notes 283-93 and accompanying text (discussing the purposes of the TVPA).
322. The importance of this role should not be underestimated. Justice Powell recognized the critical contribution of U.S. courts:
   Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving an “act of state” is relegated to political rather than judicial processes.
First, clearly, the revisionist critique of the modern position does not affect the ongoing § 1350 litigation.\textsuperscript{323} Second, Congress's explicit endorsement of the modern position—including the \textit{Filartiga} line's reliance on the modern view—discredits the normative and conceptual underpinnings of the broader revisionist project. As we outlined in part III, § 1350, as understood by both Congress and the federal courts, counsels against accepting the revisionist position.

Indeed, for nearly twenty years, the federal government—through Republican and Democratic administrations, Congresses controlled by both parties, and numerous federal courts—has spoken with one voice on the status of CIL in U.S. law: Universally-recognized human rights are judicially-recognizable federal law.\textsuperscript{324}

\textsuperscript{323} The revisionists recognize that § 1350 litigation is unaffected by their formulations. \textit{See} Bradley & Goldsmith, Customary International Law, \textit{supra} note 24, at 871-72 (suggesting that demise of the modern position need not alter ongoing ATCA litigation); Weisburd, \textit{Executive Branch, supra} note 24, at 1247 n.190 (same).

\textsuperscript{324} Of course, the political branches could, and often do, limit or qualify the incorporation of universal CIL into U.S. law. \textit{See} Bradley & Goldsmith, Human Rights Litigation, \textit{supra} note 24, at 340 (discussing United States treaty RUDs as evidence of political branch opposition to the modern position). This does not, however, diminish the strength of the modern position. Simply put, our analysis demonstrates that the revisionist default rule runs in the wrong direction: Universal CIL is federal common law unless the political branches clearly limit the scope of its application in U.S. law.